


*Instructor's Manual and Test Bank*

# **TORT LAW FOR PARALEGALS**

Neal R. Bevens

**ASPEN**  
PUBLISHERS



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# Instructor's Manual and Test Bank

to accompany

## **TORT LAW FOR PARALEGALS**

**Neal R. Bevans, J.D.**

**ASPEN**  
PUBLISHERS

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## **Introduction**

This instructor's manual is designed to assist you, the paralegal instructor. I have attempted to put as many resources at your disposal as possible so that you can spend more time developing your course and less time developing your course documents. In the following pages, you will find a chapter-by-chapter breakdown of additional materials that will hopefully assist you in your vital role as instructor.

### **Features of the Instructor's Manual:**

#### **-Chapter Lecture Outline and Discussion**

Each section contains some introductory remarks about the chapter and a complete chapter outline.

#### **-Additional Web Resources**

These additional web sites provide other resources for classroom discussion and assignments.

#### **-Additional Assignments**

These assignments are in addition to the assignments listed in the text.

#### **-Answers to Review Questions**

The end of chapter review questions are answered in detail.

#### **-Answers to "Applying What You Have Learned"**

Each chapter contains a section entitled "Applying What You Have Learned." These sections are designed to provide practical, hands-on assignments for the students. This section of the Instructor's Manual lists the answers to these various assignments.

#### **-Test Bank**

The test bank includes a variety of test questions, including:

Essay questions (five per chapter)

Short Answer (ten per chapter)

Multiple Choice (twenty five per chapter)

True-False (ten per chapter)

### **Features on the CD-ROM to accompany the book:**

#### **-Power Point Slides**

The author has prepared a power point presentation for each chapter of the text.

#### **-Additional Cases**

You will also find an additional, slightly edited case for each chapter of the text. You could use this case in a variety of ways, including a lecture handout, additional assignment, or as a spur to further classroom discussion.





# Chapter One

## An Introduction to Tort Law

### Lecture Outline

*Outline discussion:* Students often find the topic of civil injuries to be intimidating. An introduction that focuses on similarities between this area of law and other courses that the students may have already had, or at least have some passing familiarity with, often helps to alleviate this intimidation. The chapter mentions the similarities (and important differences) between civil injuries law and criminal law. This often presents good discussion areas, such as the critical differences between a criminal action for assault and a private law suit for assault.

This chapter also introduces the "Chumley case," which will be mentioned throughout the text. Although the basic facts of the Chumley case are set out in the first few pages of the chapter, it might also provide a good discussion point to have the students review the Chumley material provided in the Appendix.

### Chapter 1 Outline

#### I. Introduction to a Torts Case

- A. "Can I Sue?"
- B. Torts are legal wrongs
- C. Cause of Action
- D. The basis of a lawsuit is a cause of action

#### II. Tort law compared to other forms of law

- A. Who brings the case?
- B. The Pleadings
- C. Civil and criminal cases operate independently of one another
- D. Proof in a civil case is preponderance of evidence
- E. Terms are different

#### III. Tort law compared to other areas of law

- A. The different kinds of torts

#### IV. A short history of tort law

- A. An eye for an eye
- B. Money for an eye
- C. The Development of Tort Law in the United States

#### V. Bringing a Tort Case

- A. Investigating the Cause of Action: Rule 11
- B. Litigation Chart
- C. Sources of proof
- D. Filing a Complaint

#### VI. The Trial of a Tort Case

- A. Jury selection



- B. Opening statement
- C. Presentation of the Plaintiff's case
- D. Motion for Directed Verdict
- E. The Defense Case
- F. Closing Argument
- G. Jury Charge
- H. The Verdict

## VII. Appeals

- A. The importance of case law
  - 1. How is case law created?
- B. *Stare decisis*
- C. An example of case law
- Skills You Need in the Real World: How a Paralegal Can Do Some Basic Investigative Work
- The Life of a Paralegal: Debra Holbrook
- Chapter Summary
- Web Sites
- Ethical Issues for the Paralegal: An Introduction
- Forms and Court Documents: Complaint

## Additional Web Resources

Locating people:  
[www.PeopleFind.com](http://www.PeopleFind.com)

The Virtual Chase  
<http://www.virtualchase.com/>

National Association of Legal Assistants  
<http://www.nala.org/>

Guide to Using the Internet  
<http://www.learnthenet.com>

## Additional Assignments

Have your students read, "10 Ways to Look Cool at the Courthouse," Student's Workshop Column, N. Bevans, Legal Assistant Today, November/December 2002, p. 89, and then answer the question: What are some methods that you can use to help you learn your way around the courthouse and to establish working relationships with courthouse personnel?"

## Answers to Review Questions

1. What is a cause of action?

A cause of action is an injury suffered by the plaintiff for which the law provides a legal remedy.

2. How is tort law different from criminal law?

Tort law differs from criminal law in several important respects: 1. The parties are different. In a prosecution, the state brings charges against the defendant. In a torts case, an individual sues another individual. 2. The result is different. In a criminal case, a defendant can be convicted and sentenced to jail term and/or a fine. In a torts case, if the defendant is found liable to the plaintiff, he can be ordered to pay compensatory damages, but he will not face a jail term.

3. What are the names of the parties who bring a civil suit?

The Plaintiff brings the action by filing a Complaint; the Defendant is the person sued who responds to the Complaint with an Answer.

4. Explain the difference between a Complaint and an Answer.

A Complaint sets out the plaintiff's cause of action by alleging the facts that show how the defendant is responsible for the plaintiff's injuries. An Answer is the defendant's response to the Complaint and sets out any defenses or facts in mitigation from the defendant's perspective.

5. Explain the difference between the burden of proof in a civil case and a criminal case.

The burden of proof in a civil case is preponderance of the evidence, which is usually defined as proof that the plaintiff's version of the facts is more likely true than not; in a criminal case, the state's burden is proof beyond a reasonable doubt.

6. What is a Litigation Chart and how does it help the parties prepare for trial?

A litigation chart is a schematic break down of the elements of the plaintiff's claim, matched to proof through testimony and evidence. It is useful because it helps the parties organize the case for trial and helps to reveal any weaknesses in the case prior to trial.

7. What are some of the public records that can provide helpful information in investigating a case?

There are numerous public records that can be useful to a paralegal investigating a case. They include: Clerk's office records of lawsuits; Deed room records showing real property transactions; Tax office records showing value of property, location and often a great deal of other information.

8. How is case law developed? Why is it important?

Case law develops out of the decisions of appellate courts. A court is presented with an appeal from a lower court decision and when the court reaches its decision, it publishes its reasoning in an opinion. These opinions become case law and others rely upon this case law in formulating their own appeals.

9. Explain stare decisis.

Stare decisis means to stand by the decided cases. It is a principle followed by judges that dictates that when a judge is presented with a case involving similar facts and similar issues as a previously decided case, the judge must rule the same way as the previous case. Stare decisis helps to ensure continuation of legal doctrine from generation to generation and also provides some sense of predictability and stability in the court system.

10. List and describe the basic steps of a civil trial

A civil case begins with a jury selection (usually called "voir dire"). After jury selection, the attorneys give opening statements to the jury where they outline what they expect will occur in the trial and the type of evidence/witnesses the jury will hear from. Following that, the plaintiff presents his case-in-chief, by calling witnesses to the stand, placing them under oath and asking them questions on direct examination. When the attorney is finished with the witness, the opposing attorney is permitted to cross-examine the witness about key points of his testimony. Following the plaintiff's case-in-chief, the defendant has the same opportunity. When the defendant's case is completed, the attorneys will argue their case to the jury in closing arguments. Following closing arguments, the judge informs the jury about the law that applies to the case (jury charge) and then the jury retires to consider its verdict.

**Answers to "Applying What You Have Learned"**

1. Review the *Coney v. Union Pacific R.R.* Why did the plaintiff in that case receive \$0 from the jury for his damages?

There are two reasons: 1) the jury found that the train was operating at less than the posted speed limit and 2) that the plaintiff and the defendant were both 50% at fault in the cause of the accident and this case was decided in a state that does not allow a plaintiff to recover damages when his negligence is greater than or equal to the defendant's negligence.



2. Draft a complaint based on *Coney v. Union Pacific RR* (the case excerpt).

STATE OF PLACID

IN THE SUPERIOR COURT

COUNTY OF BARNES

FILE NUMBER: \_\_\_\_\_

Alvin Coney

)

)

Plaintiff

)

)

vs.

)

)

Union Pacific RR, Inc.

)

Defendants.

### COMPLAINT

COMES NOW, the plaintiff, Alvin Coney, and complaining of the defendant alleges the following:

1.

The Plaintiff is a citizen and resident of Gannett County, Placid.

2.

The Defendant is, upon information and belief, a citizen and resident of Gannett County, Placid.

3.

On November 15, 1994, plaintiff's vehicle collided with Defendant's freight train.

4.

Defendant failed to provide adequate and active warning devices, maintain a proper lookout, sound the train's whistle, and operate its train at an appropriate speed.

5.

That as a proximate cause of the Defendant's negligence, the Plaintiff suffered severe, debilitating and permanent injuries in excess of \$10,000.00

WHEREFORE, the Plaintiff prays that the Court as follows:

1. That the Plaintiff, Alvin Coney, have and recover a judgment against the Defendant in an amount in excess of \$10,000.00 for personal injuries.

2. That the Defendant be assessed with punitive damages as permitted by law

3. That pre-judgment interest be awarded as provided by law
4. That the costs of this action be taxed against the Defendant.
5. That all issues raised be tried before a jury
6. For such other and further relief as the Court may deem just and proper.

This the \_\_\_\_ day of June, 2002.

---

Clarence D. Arrow  
Attorney for Plaintiff, Alvin Coney  
State Bar No. 000-998

## **Test Bank**

### **Essay Questions (5):**

1. Explain the differences between cases involving civil injuries and crimes.
2. How have the concepts of tort law changed over time?
3. What effect did the Industrial Revolution have on the history of tort law?
4. Describe the steps involved in beginning a lawsuit.
5. Explain how a civil case proceeds from the beginning of the trial until it concludes.

### **Short Answer (10)**

1. What is the definition of "tort?"
2. What is the definition of cause of action?
3. What are the names of the two pleadings that begin a lawsuit and what function does each serve?
4. Can a single set of actions be the basis of both a criminal action and a tort action? If so, how?
5. Explain the difference in the burdens of proof between tort cases and criminal cases.
6. How did the locomotive impact the development of tort law in the U.S.?
7. How can a litigation chart help the legal team prepare for trial?
8. What are some public records that are useful in investigating a person and/or a claim?
9. Explain "voir dire."
10. What are the three decisions that an appellate court can make on an appeal?



## Multiple Choice (25)

1. A legal injury for which the law provides a remedy.
  - A. Stare decisis
  - B. Respondeat Superior
  - C. Cause of Action \*
  - D. Verdict
2. The legal pleading that begins a civil lawsuit
  - A. Complaint \*
  - B. Answer
  - C. Interrogatory
  - D. Appeal
3. The term for the person who has a cause of action and begins a lawsuit:
  - A. Respondent
  - B. Defendant
  - C. Appellant
  - D. Plaintiff \*
4. The term for the burden of proof in a criminal case.
  - A. Preponderance of the evidence
  - B. Proof beyond a shadow of a doubt
  - C. Proof beyond a reasonable doubt \*
  - D. Proof beyond all doubt
5. The legal pleading filed by the defendant in a civil case:
  - A. Complaint
  - B. Answer \*
  - C. Motion for Directed Verdict
  - D. Cert.
6. When the jury reaches its decision, this is called:
  - A. A decision
  - B. An opinion
  - C. A verdict \*
  - D. A final judgment
7. An appellate court's decision agreeing with the decision in the lower court:
  - A. Affirm \*
  - B. Reverse
  - C. Remand
  - D. Restate

8. The historical approach to an injury inflicted by one person on another:
- A. Eye for an eye \*
  - B. Monetary compensation commensurate with the injury
  - C. Respondeat superior
  - D. Stare decisis
9. Tort law in the United States
- A. Developed quickly in the 1800's
  - B. Only recently became a specialized area of law
  - C. Developed slowly in the 1800's \*
  - D. None of the above
10. The jury's possible determinations in a criminal case:
- A. Liable or not liable
  - B. Innocent or culpable
  - C. Not guilty or guilty \*
  - D. None of the above
11. The jury's possible determinations in a civil case:
- A. Liable or not liable \*
  - B. Innocent or culpable
  - C. Not guilty or guilty
  - D. None of the above
12. All of the following are ways that a plaintiff can seek to prove his case, except one. Which one is not correct?
- A. Attorney's personal belief \*
  - B. Witness testimony
  - C. Evidence
  - D. Argument to the jury
13. The term for the attorney's initial address to the jury in which he/she outlines the case and tells the jurors what they can expect to see and hear during the trial.
- A. Voir dire
  - B. Jury Selection
  - C. Case in chief
  - D. Opening Statement \*
14. The term used for the process of selecting members of the community to serve on a jury
- A. Voir Dire \*
  - B. Stare Decisis
  - C. Mea Culpa
  - D. Quia timet

15. The term that describes the court system's principle of following previously decided cases.

- A. Voir Dire
- B. Stare Decisis \*
- C. Cert.
- D. Remand

16. The term for the questioning of a witness by the attorney who initially called him/her to the stand.

- A. Direct examination \*
- B. Cross-examination
- C. Impeachment
- D. Offer of proof

17. At the conclusion of the plaintiff's case, the defendant will often bring the following motion:

- A. Motion for more definite statement
- B. Motion for sequestration
- C. Motion for discovery
- D. Motion for directed verdict \*

18. The body of judicial decisions stretching back for centuries.

- A. Statutes
- B. Ordinances
- C. Case law \*
- D. Legal memoranda

19. The term for an appellate court's (like the U.S. Supreme Court) decision to hear an appeal

- A. Affirmance
- B. Reformation
- C. Voir Dire
- D. Cert. \*

20. When the attorney makes a presentation shortly before the case is concluded and argues how his version of the case should prevail:

- A. Closing Presentation
- B. Closing Argument \*
- C. Closing Rebuttal
- D. Closing Statement

21. When the judge addresses the jurors shortly before they retire to consider their verdict, telling them what law they should apply to the facts of the case:
- A. Jury nullification
  - B. Jury sequestration
  - C. Jury view
  - D. Jury charge \*
22. All of the following offices have public records available that can assist with an investigation of a case, except one. Which one does not?
- A. Evidentiary court \*
  - B. Clerk's office
  - C. Deed room
  - D. Tax office
23. When the state brings a criminal case, it is usually captioned:
- A. Plaintiff v. Defendant
  - B. Respondent v. Respondee
  - C. State v. Defendant \*
  - D. Affirmant v. Appellee
24. The term for the burden of proof in a civil case
- A. Beyond a reasonable doubt
  - B. Preponderance of the evidence \*
  - C. Beyond the shadow of a doubt
  - D. Beyond all doubt
25. When an appellate court disagrees with the decision of a lower court, they enter an order that:
- A. Affirms the lower court's decision
  - B. Reverses the lower court's decision \*
  - C. Obviates the lower court's decision
  - D. Dismiss the lower court's judge

### True-False (10)

1. A civil case and a criminal case can be based on the same occurrence. (T)
2. When a civil jury finds that the defendant is responsible, they find him guilty (F)
3. When an appellate court is presented with a case involving similar issues and similar facts as a previously decided case, the court will rule the same way as the previously decided case. (T)
4. Under modern tort law, a plaintiff is entitled to receive monetary damages for proof of injury caused by the defendant. (T)
5. When a defendant contests the plaintiff's allegations in the plaintiff's Complaint, he responds with an Answer. (T)
6. Jury selection is also known as "voir dire." (T)

7. When a plaintiff proves his tort case, he is entitled to request prison time for the defendant. (F)
8. The plaintiff's burden in proving his tort case is beyond a reasonable doubt. (F)
9. A litigation chart is helpful in determining what witnesses and evidence will help prove the contentions in the case. (T)
10. A Motion to Directed Verdict comes at the beginning of the trial. (F)





## Chapter 2

### Intentional Torts

#### Lecture Outline

*Outline discussion:* This chapter discussed intentional torts. One area of concern in discussing this material concerns how to orient the student towards this material. For instance, some instructors discuss intentional torts early in the course and then juxtapose this material with negligence. Others take on negligence first, and then save intentional torts for later. Whatever you approach you decide to take, there are critical differences between negligence and intentional torts, not the least of which concerns the pivotal issue of intent. It should be stressed that intentional torts focus on the mindset of the tortfeasors at the time of the incident. An intentional tort does not mean that the tortfeasor intended a specific consequence. Instead, intent in this regard concerns the natural and logical consequences of the tortfeasor's actions.

#### Chapter 2 Outline

- I. The Chumley Case
- II. The Problem with Intentional Torts
- III. Assault and Battery
  - A. The elements of assault
    - 1. The defendant's actions are intentional
    - 2. Fear or apprehension
    - 3. Harmful or offensive contact
  - B. The elements of battery
    - 1. Defendant acted intentionally
    - 2. What do we mean by 'contact?'
      - a. Making contact with weapons or other objects
    - b. The connection between the defendant's actions and ultimate harm
      - 3. Harmful or Offensive Contact
      - 4. The Reasonable Person Standard
- IV. False Imprisonment
  - A. The elements of false imprisonment
    - 1. Discussing the Elements: Restraint Must be Intentional
    - 2. Unlawful restraint
    - 3. By the Use of Force or Threats
    - 4. Holding personal property hostage
  - B. Defenses to False Imprisonment
    - 1. Consent
    - 2. Case Excerpt
- V. Alienation of Affections
- VI. Intentional Infliction of Emotional Distress
  - A. Elements of Infliction of Emotional Distress

1. Intentional or reckless conduct
  2. Bystander Emotional Distress
  3. Causation
- B. Emotional Distress: What is it?
1. The defendant's actions were outrageous
- VII. Malicious prosecution
- A. The elements of Malicious Prosecution
1. Defendant brings or continues a criminal charge against the plaintiff
  2. The case terminates in the plaintiff's favor
  3. The defendant acted with malice in bringing the charge
  4. There was no probable cause for the charge
- VIII. Tort immunity for families
- IX. Intentional Torts involving Property: Trespass
- A. Discussing the elements: Intent
1. Unprivileged
  2. Entry onto the plaintiff's real property
    - a) Proving 'Entry'
  3. Without permission
- X. Nuisance actions
- A. Public nuisance vs. Private nuisance
1. Private nuisance
    - a) The elements of a private nuisance action
  2. Damages and Injunctions
- B. New lawsuits under environmental theories
- XI. Torts to personal property: Trespass to chattels
- Skills You Need in the Real World: Keeping Track of Your Time
  - The Life of a Paralegal: Linda McCurry
  - Chapter Summary
  - Ethical Issues for the Paralegal: Statutes of Limitation
  - Web Sites
  - Forms and Court Documents: complaint for battery

### **Additional Web Resources**

- Outline of Prosser, Wade and Schwartz's Cases and Materials on Torts  
<http://www.geocities.com/haeji/school/tort.txt.html>
- Intentional Torts Outline  
<http://home.wlu.edu/~wendelb/Torts/intentional.html>
- University of Pittsburgh Tort Outline  
<http://www.pitt.edu/~lawwomen/outlines/tortmeisel.doc>

### **Additional Assignments**

1. Ask your students to study any recent noteworthy case involving an intentional tort (criminal cases are often useful), and ask the students to analyze the facts of the case for any and all intentional torts that might be justified under the facts.

2. Have your students search the Internet for sites related to intentional torts, especially torts such as intentional infliction of emotional distress, malicious prosecution, etc. Have them give a presentation to the class about what sites are available and how these sites provide accurate/inaccurate information about the topic.

## **Answers to Review Questions**

1. How does assault differ from battery?

Assault is the fear or apprehension of harmful/offensive contact, while battery is actual contact that is harmful/offensive. As assault is essentially an attempted battery.

2. Explain what is meant by the term “elements of proof?”

The elements of a tort refer to the specific allegations that a plaintiff must prove at trial in order to establish a prima facie case. Proof of elements can be presented through a combination of documents, testimony and other evidence.

3. Explain the reasonable person standard. Why is it used?

The reasonable person standard (formerly the “reasonable man” standard) was created as a way for courts to evaluate the defendant’s actions from an objective, rather than subjective viewpoint. The reasonable person standard routinely poses the questions, would a reasonable person have acted the same way as the defendant? If the answer is no, the defendant is likely to be found at fault for the plaintiff’s injuries.

4. Why can’t an unconscious person be assaulted?

Assault requires fear or apprehension. An unconscious person cannot manifest either. Without this awareness of the defendant’s actions, the unconscious person falls outside the provable elements of the offense of assault.

5. What are the elements of false imprisonment?

When a plaintiff brings a suit for false imprisonment, he is saying that he was intentionally, unlawfully restrained against his will by the use of force or the threat of force.

6. What is the justification for continuing to allow lawsuits for interference with private property? Couldn’t these situations simply be resolved through the criminal courts?



In some situations, the defendant's actions may not rise to the level of a criminal infraction. After all, the level of proof in criminal cases is proof beyond a reasonable doubt and the facts of the case may not lend themselves to that degree of proof. Without a private action for trespass to property, a plaintiff would be left without a legal recourse.

7. How does a 'private nuisance' differ from a 'public nuisance'?

A public nuisance is some condition that affects rights of citizens in general. A private nuisance action, by contrast, involves a dispute between two or more specific individuals, (usually on adjoining tracts of land).

8. Explain the elements of alienation of affections. Should such a civil injury continue to provide a cause of action for plaintiffs? Why or why not?

The elements to alienation of affections include Interference with the marriage by the defendant

- ☐ The subsequent loss of affection by one spouse for another
- ☐ Caused by this interference
- ☐ And the interference was motivated by malice.

The remainder of the answer will vary by student opinion.

9. Why is there a tort for trespass to chattels? What are chattels?

A 'trespass to chattels' is a suit based on the defendant's interference with the owner's rights to his personal property. A chattel refers to the plaintiff's personal property. The remainder of the answer will vary by student opinion.

10. What are some of the methods a paralegal can use to maintain good client relations?

When paralegals are dealing with clients on the telephone, they should always keep a handy reference about the client nearby. That way, they can have specific information about the client on hand. They should also promptly return telephone calls and emails.

## Answers to "Applying What You Have Learned"

1. Rick is a fully competent adult who has decided that he doesn't want critical medical attention that would clearly save his life. His doctor decides to treat Rick anyway. Has the doctor committed the tort of battery?

Answer: Yes, according to *Rodriguez v. Pino*, 634 So. 2d 681 (1994)



2. Nora was originally admitted into Happy Dale Nursing home without incident. However, after she'd been there for a day, she decided that she wanted to go home. The management of the nursing home facility refused to release her to son, when he arrived to take her home, because it was Nora's daughter who had arranged for Nora's admission to Happy Dale. Does Nora have a valid claim for false imprisonment?

Answer: No, according to the Court in *Pounders v. Trinity Court Nursing Home, Inc.*, 265 Ark 1, 576 SW2d 934 (1979)

3. Claudia's daughter, Rachel, goes out on a date one night with Ross. While they are driving, Ross loses control of the car and runs off the road. Rachel is killed. Ross drags her body several hundred feet from the scene of the accident and arranges Rachel's body to make it look like she was struck by a car while she was walking. The next morning, Ross calls Claudia and accuses Rachel of stealing his car and worries that something may have happened. Does Claudia have a claim for intentional infliction of emotional distress?

Answer: Yes, according to the court in *Nichols v. Busse*, 243 Neb 811, 503 NW2d 173 (1993)

## Test Bank

### Essay Questions (5)

1. John is a security guard at a local military base. He notices a strange man apparently attempting to cut through the chain link fence surrounding the base. Although John is not a police officer, he tackles the man, holds him down by force and then calls for the police. When the police arrive, they discover that the man is a contractor who was hired to repair the fence. Can the man bring a successful action for false imprisonment against John? Why or why not?
2. Why would a "bystander" be justified in bringing a case for intentional infliction of emotional distress? Wouldn't this mean that anyone who saw something unpleasant could bring suit?
3. Tom, a police officer, receives a radio call that authorizes him to arrest Ted. Later, the charge against Ted is dismissed. Can Ted bring a successful claim of malicious prosecution against Tom?
4. Explain why the objective person standard is used in intentional tort cases, instead of the subjective person standard.
5. Explain why there is a requirement of fear or apprehension in assault, but there is no such requirement in battery.

### Short Answer (10)

1. How is assault different from battery?
2. When a police officer arrests someone why isn't that considered false imprisonment?
3. Why is consent a defense to false imprisonment?
4. Explain how consent figures in the decision in the chapter case excerpt Rodriguez v. Pino.
5. Explain the requirement of "outrageousness" in a claim of intentional infliction of emotional distress.
6. How does the requirement of outrageousness in intentional infliction of emotional distress cases limit frivolous lawsuits?
7. Explain trespass to chattels.
8. Explain the difference between the assault and battery.
9. Why is there a requirement for fear or apprehension in the tort of assault, but there is no such requirement for battery?
10. Explain how and under what circumstances a private nuisance action can be brought.

### Multiple Choice (25)

1. In order prove the tort of malicious prosecution the plaintiff must show that there was no \_\_\_\_\_ for the original charge against him.
  - A. Basis in fact
  - B. Truth
  - C. Probable cause \*
  - D. Guilt
2. A civil action based on a defendant's purposeful, intentional act that causes harm, as opposed to a defendant who causes harm through negligence.
  - A. Contract action
  - B. Negligence tort
  - C. Intentional tort \*
  - D. Strict liability tort
3. Fear or apprehension of a harmful/offensive contact
  - A. Assault \*
  - B. Battery
  - C. False Imprisonment
  - D. Intentional Infliction of Emotional Distress

4. The legal requirement that the plaintiff be a person who would likely be injured by the defendant's conduct

- A. Strict Liability
- B. Foreseeability \*
- C. Intentional tort
- D. Reasonable Person standard

5. Each of the following is an element of false imprisonment except one. Which one is not an element?

- A. That the defendant's actions were unlawful
- B. Restraint of the plaintiff person
- C. Illegal incarceration in a jail or prison \*
- D. By the use of force or threats

6. When a person interferes with a couple's marital relationship, the tort of \_\_\_\_\_ may be triggered.

- A. Alienation of affections \*
- B. Intentional infliction of emotional distress
- C. Battery
- D. False Imprisonment

7. When the defendant, through intentional or reckless conduct, causes the plaintiff severe mental distress through outrageous conduct.

- A. Battery
- B. Psychic injury
- C. Outrage
- D. Intentional infliction of emotional distress \*

8. A tort that is designed to punish people who use the court system as a way to harass or intimidate other people

- A. Intentional infliction of emotional distress
- B. Alienation of affections
- C. Subrogation
- D. Malicious Prosecution \*

9. When the defendant exercises control over the plaintiff's property and removes it from the plaintiff's rightful possession.

- A. Absconding
- B. Conversion \*
- C. Battery
- D. Condescension

10. An ancient term for personal property

- A. Mariner
- B. Fee
- C. Signification
- D. Chattel \*

11. A cause of action that is authorized when the defendant's behavior results in a loss of enjoyment or value in the plaintiff's property

- A. Alienation of affections
- B. Nuisance \*
- C. Deterioration
- D. Trespassory intent

12. All of the following are elements of trespass to property, except one. Which one is not?

- A. Unprivileged
- B. Entry
- C. Placing plaintiff in fear or apprehension \*
- D. Without permission

13. Jane is twelve years old and has been punished by her father. She wishes to bring an action against her father for intentional infliction of emotional distress. Her suit:

- A. Will be successful because Jane is authorized to bring such a suit
- B. Will be successful because Jane is twelve years old
- C. Will not be successful because a parent may punish a child in any way he sees fit
- D. Will not be successful because of tort immunity for families \*



14. One of the main requirements in a malicious prosecution is that the defendant acted with malice. What does malice mean in this context?

- A. That the defendant acted out of bias or prejudice against the plaintiff and that the charge was baseless \*
- B. That the defendant acted out of a concern for public safety
- C. That the defendant acted out of a genuine concern for the plaintiff
- D. That the defendant was legally insane at the time that he brought the baseless charge

15. A legal protection that prevents a person from liability in a civil suit

- A. Sanctuary
- B. Testament
- C. Immunity \*
- D. Stare decisis

16. What is an intentional tort?

- A. An intentional tort is one in which the parties act negligently.
- B. An intentional tort is a civil action based a defendant's knowing and purposeful action \*
- C. An intentional tort involves a violation of a criminal statute
- D. An intentional tort is indistinguishable from a tort based on negligence

17. The tort that is defined by harmful or offensive touching

- A. Assault
- B. Battery \*
- C. Intentional infliction of emotional distress
- D. False Imprisonment

18. When comparing cases involving negligence claims to cases involving intentional torts:

- A. Cases involving intentional torts far out number the cases involving negligence
- B. Cases involving intentional torts are considerably fewer than cases involving negligence actions \*
- C. Cases involving intentional torts are approximately equal to the number of cases involving negligence actions
- D. None of the above



19. While Mary is asleep, Ted attempts to strike a proper. His first attempt fails. However, he is successful in his second attempt. Analyze these facts to determine which torts, if any, have occurred.

- A. Only the tort of battery has occurred, because Mary was actually struck by Ted.
- B. Only the tort of assault has occurred, because Ted was unsuccessful in striking Mary
- C. The torts of assault and battery have occurred \*
- D. Neither the tort of assault nor the tort of battery have occurred

20. The text uses the term "elements" to describe what?

- A. The fact that a defendant can be the subject of a both criminal and a civil action
- B. The basic points that must be proven at trial
- C. The type of damages that can be brought by a successful plaintiff
- D. A specific tort that involves mental injury

21. Ted is driving his car one afternoon and fails to stop for a red light. As a result, he crashes his car into another car that is driven by John. John sues Ted for battery. What is the likely result of this trial?

- A. John will win his case because Ted has satisfied all of the elements of battery
- B. John will win his case because Ted violated one of the rules of the road
- C. John will lose his case because Ted actions are negligent, not intentional \*
- D. John will lose case because Ted did not intentionally run the red light

22. Arnold is a large man, has been trained in various forms of martial arts. Tom, who is considerably smaller, waves his finger in Arnold's face during the course of an argument. Can Arnold bring a claim of assault against Tom?

- A. Yes, because Tom's actions clearly satisfy the element of apprehension that is found in the assault.
- B. Yes, because Yes, because although there is no requirement that Arnold be afraid, Arnold was clearly afraid of Tom
- C. No, because Tom's finger waving did not rise to the level of what a reasonable person would consider to be the apprehension of harmful or offensive contact \*
- D. No, because Arnold cannot bring a claim because he is larger than Tom

23. Mary is riding the subway one day. When the doors of the subway open, Mary steps out onto the platform. However, the subway train has stopped well short of the platform and Mary is about to step out into space. Before she falls, Ted grabs her and pulls her back into the subway train. Instead of being grateful, Mary accuses Ted of battery. Mary claims in her complaint that she does not like to be touched and when Ted touched her, even though he did so with the best of intentions, he carried out an action that she considered to be harmful or offensive contact. When Ted files a motion to dismiss Mary's complaint, how is the judge likely to rule?

- A. The judge will dismiss Mary's complaint because Mary cannot prove that Ted actually touched her
- B. The judge will dismiss Mary's complaint because Ted's contact with Mary is not what a reasonable person would consider to be harmful or offensive contact
- C. The judge will dismiss Ted's motion and allow Mary's suit to continue because Ted has clearly touched Mary
- D. The judge will dismiss Ted's action and allow Mary's complaint to continue, because Mary has set out all the required elements for the Tort of battery

24. John mails a letter to Clark in which he states that he would like to punch Clark in the nose. Clark files a complaint alleging assault against John. Does Clark have the basis for a claim of assault against John?

- A. No, Clark actually has a valid claim for battery
- B. No, Clark has an action for false imprisonment against John
- C. Yes, Clark has an action for assault against John
- D. Clark does not have an action for assault against John because John's threat must be contemporaneous with his ability to carry it out.

25. One day, Ted is playing in his backyard with his dog. Suddenly he is struck in the back of his head by a rock. When he looks around, he sees Dave smiling at him over the top of his fence. Ted asks Dave, "Why did you hit me?" Dave responds, "Because I felt like it." Ted brings a battery action against Dave. What is the likely result?

- A. Ted will win his case because he encountered fear or apprehension when he was struck by the rock.
- B. Ted will win his case because we can prove that the rock caused him harmful or offensive contact
- C. Ted will lose his case because he has failed to allege fear or apprehension
- D. Ted will lose his case because Dave did not make direct physical contact with him.

### True-False (10)

1. The tort of malicious prosecution was created as a way to punish law enforcement officers who made illegal arrests. (F)
2. In order to prove the intentional infliction of emotional distress, the plaintiff must prove that the defendant's actions were outrageous. (T)
3. In some jurisdictions, bystanders may bring claims of intentional infliction of emotional distress. (T)
4. Many jurisdictions no longer recognize the tort of alienation of affections. (T)
5. One requirement of a malicious prosecution action is that the plaintiff actually wins the underlying case. (T)
6. Most insurance defense firms bill by the hour. (T)
7. Keeping track of the time you spend on various activities is important whether your work for a plaintiffs' firm or an insurance defense firm. (T)
8. When a person converts property, it means that he initially had legal right to use or possess the property, but then failed to return it. (T)
9. A nuisance action can be either a private action or a public action. (T)
10. Public nuisance actions are actually prosecution for criminal violations. (F)

## Chapter 3

### Defenses to Intentional Torts

#### Lecture Outline

*Outline Discussion:* This chapter focuses on the defenses available to intentional torts. The elements of the various defenses are set out and explained in detail. Students often have misconceptions about these various defenses, and clearing them early in the process can only aid discussion later.

#### Chapter 3 Outline

- I. What is a Defense?
- II. Self defense
  - A. The response must be equal to the threat
  - B. Limitations on self-defense
    - 1. No self-defense for aggressors
      - a) Can claim self defense if voluntarily stopped fighting
    - 2. No self-defense for martial artists, etc.
  - C. Claiming self-defense when defending others
  - D. Other limitations on self-defense: no deadly force to protect property
  - E. Mutual Combat
- III. Consent
  - A. Who can give consent?
- IV. Duress, Necessity, Compulsion and Coercion
  - A. Duress
  - B. Coercion
  - C. Necessity
  - D. Compulsion
- V. Intoxication
  - A. Involuntary intoxication
- VI. Mistake
- VII. Age
- VIII. Insanity
  - A. Two different forms of insanity defense
- IX. Immunity
- X. Privilege
- XI. Statutes of limitation
- XII. Defenses Available to Codefendants
  - A. Joint and several liability
  - B. Vicarious Liability
    - 1. Employer/Employee Liability (*Respondeat Superior*)
      - a) Limitations on *Respondeat Superior*
        - Scope of employment
        - Frolic and detour



-Independent contractor

2. Other situations in which Vicarious Liability is authorized: Family Purpose Doctrine

3. Other situations in which Vicarious Liability is authorized: Joint Enterprise

- Skills You Need in the Real World: Evaluating a Case
- The Life of a Paralegal: Lisa Mazzone
- Chapter Summary
- Ethical Issues for the Paralegal: Avoiding a Claim of Unauthorized Practice of Law
- Web Sites
- Forms and Court Documents: Answer to Complaint in Chapter 2

### **Additional Web Resources**

- Verdicts and Settlements Database of Law Journal EXTRA  
[www.ljextra.com/cgi-bin/vds](http://www.ljextra.com/cgi-bin/vds)
- Lawyers Weekly  
[www.lweekly.com](http://www.lweekly.com)
- Defenses to Intentional Torts  
[http://www.stcl.edu/faculty\\_pages/faculty\\_folders/steiner/defenses-intentional/](http://www.stcl.edu/faculty_pages/faculty_folders/steiner/defenses-intentional/)

### **Additional Assignments**

1. Obtain a copy of a complaint and answer for a personal injury case from the local courthouse. Based on the facts presented in the case, have your students review the case for liability as suggested by the chapter.
2. Obtain a police report and have the students review it for the types of information that it can provide.
3. Choose a student to act as a personal injury client and have the other students evaluate him for the “intangible” factors mentioned in the text.
4. Evaluate the types of injuries in the Chumley case. How good/bad is the liability?

### **Answers to Review Questions**

1. What is the family purpose doctrine?

The family purpose doctrine” allows a plaintiff to sue the parents of a driver who causes injury, even though the parent wasn’t present in the car at the time of the accident. The idea behind it is that the automobile was provided to the family member for use and the owner remains liable for the actions of the family member.

2. When does a defendant lose the right to raise the defense of self-defense?

A defendant can lose the right to raise this defense when 1) he is the aggressor; 2) the defendant uses excessive force; 3) the defendant is trained in the martial arts; 4) the defendant uses deadly force to defend property

3. Explain 'excessive force.'

The use of force in response to a threat that clearly exceeds the threat of force made.

4. Under what circumstances can a person use deadly force to protect personal property?

In almost all jurisdictions, a person can never use deadly force to protect personal property.

5. Describe a situation in which the defendant's claim of consent would be legally invalid.

Consent obtained by force, threat, fraud or duress would be legally invalid.

6. Explain the differences between Duress, Necessity, Coercion and Compulsion

When a defendant pleads duress, he is saying that he was forced to carry out the act because someone was threatening his physical safety. When a person claims coercion, he is admitting that he committed the act, but that he was forced to do by physical or other type of threat. When a defendant claims necessity, he admits that he carried out the wrong to the plaintiff, but he did only to avoid some greater catastrophe. The defense of compulsion actually goes to the mental state of the defendant at the time that he committed the tort.

7. When is a person permitted to raise the defense of 'involuntary intoxication?'

A person can raise the defense of involuntary intoxication when he or she is exposed to chemicals or other substances that affect his mental stability without his knowledge or in such a way that he had not voluntarily exposed himself to the threat.

8. What is the legal definition of insanity?

In most jurisdictions, the standard to determine legal insanity is that the defendant, at the time that he carried out his actions, did not know the difference between right and wrong.

9. Describe a class of persons who could be protected by immunity under tort law.

Judges, prosecutors and police officers are all people who could be protected by a legal immunity from various types of intentional tort actions.

10. Explain joint and several liability.

Under this doctrine, a plaintiff who has been injured by more than one defendant is permitted to sue both and seek his total damages against them individually and as codefendants.

11. What is vicarious liability?

In vicarious liability one defendant is held liable for the actions of another.

12. When does a person qualify as an “independent contractor?”

An independent contractor is a person who is usually some form of specialist. When a person is an independent contractor, he or she controls the day-to-day decisions and actions, as opposed to an employee who works under the direct supervision of a supervisor.

13. What are some of the important points to consider when evaluating a case?

An evaluation of any case will take into account the following factors:

- The nature of the claim
- The type of injuries
- The quality of the opposing counsel
- The judge’s temperament and several other factors.

14. Give an example of a situation in which the defense of mistake would be appropriate.

Mistake can be a valid defense when the defendant’s actions would have been permissible, but for his legitimate misunderstanding.

15. What is the justification for respondeat superior?

One justification for respondeat superior is that since the employee was acting within the scope of his employment at the time that he caused injury to the plaintiff, his job duties are a primary reason for his presence and his actions that caused the resultant harm. Since the defendant was working for a company, his negligence is imputed to his employer.

## Answers to “Applying What You Have Learned”

1. Ted is a police officer. One day, he pulls over a driver for speeding and begins writing a ticket. Stan, the driver, puts the car in reverse while Ted is writing the ticket and begins to back towards Ted, who is standing between Stan’s car and Ted’s patrol car. Stan’s car is moving about 1 mile per hour. Ted pulls his service revolver and shoots Stan through the back window, killing him. When Stan’s relatives bring a civil action against Ted, does Ted have a valid claim of self-defense?

Answer: No, according to *Taran v. State*, 186 A.D.2d 794, 589 N.Y.S.2d 74 (1992)

2. A group of foreign guests at a local hotel decide that the service has not been acceptable and when the manager refuses to refund their money, they threaten him and the other staff members and then force them into the manager’s office and refuse to



allow them to leave. Does the doctrine of respondeat superior provide a claim for the manager and staff against the hotel for the guests' conduct?

Answer: No, according to *D.W. v. Radisson Plaza Hotel Rochester*, 958 F. Supp. 1368 (D. Minn. 1997)

3. John owes \$10,000 to a local businessman. Jerry, the businessman, becomes angry when John fails to pay back the money. He sends John a letter that says, in part, "If you don't pay back the money, I'll release certain facts to the press and your friends and family that you won't find very flattering." John raises a claim of duress in a Complaint he files against Jerry. Is this a valid claim?

Answer: No, according to *Meier v. Schulte*, 327 Mich 206, 41 NW2d 351 (1950)

## Test Bank

### Essay Questions (5)

1. When, and under what circumstances, can a defendant use the defense of self-defense?
2. Explain the defense of mistake.
3. What actions by a defendant could eliminate self defense as one of his possible defenses?
4. Explain the difference between a simple denial in the defendant's Answer and a legal defense.
5. Explain how a defense can mitigate the defendant's responsibility.

### Short Answer (10)

1. Explain how a defendant raises a defense.
2. Explain the insanity defense.
3. Under what circumstances can a defendant use the defense of age?
4. When is the defense of mistake available to the defendant?
5. Explain the defense of age.
6. What is an absolute defense?
7. What are some methods that a paralegal can use to avoid a claim of unauthorized practice of law?
8. What are some activities that a paralegal can perform while assisting an attorney at trial?
9. Explain how a case is evaluated for settlement and/or trial purposes.
10. What is the Family Purpose Doctrine?



## Multiple Choice (25)

1. The pleading that contains the defendant's legal defenses.
  - A. The complaint
  - B. Motion in limine
  - C. The response
  - D. The answer \*
  
2. A defense that, if believed by the jury or the judge, would authorize a finding of no liability for the defendant.
  - A. Simple denial
  - B. Absolute defense \*
  - C. Permissible defense
  - D. Subject matter defense
  
3. The pleading that contains the defendant's legal defenses.
  - A. The complaint
  - B. Motion in limine
  - C. The response
  - D. The answer \*
  
4. In this defense, the defendant admits that he violence against the plaintiff, but was compelled to do so in order to protect himself.
  - A. Insanity
  - B. Self defense \*
  - C. Waiver
  - D. Mitigation
  
5. A plaintiff can consent to attach to the following types of injuries?
  - A. Physical injury
  - B. Emotional injury
  - C. Financial injury
  - D. All of the above \*
  
6. The form of vicarious liability where the employer is liable for the actions of an employee.
  - A. Joint enterprise
  - B. Family Purpose Doctrine
  - C. Res Ipsa Loquitur
  - D. Respondeat Superior \*

7. The term used to describe the employer's zone of responsibility for the employee's actions.

- A. Frolic and detour
- B. Scope of employment \*
- C. Responsibility factor
- D. None of the above

8. The term used when an employee is out running a personal errand, or actually away from his job without permission, thus relieving the employer of liability for the employee's actions.

- A. Frolic and detour \*
- B. Respondeat superior
- C. Scope of employment
- D. None of the above

9. When a person is classified in this category, he is not an employee and there is no respondeat superior claim.

- A. A management employee
- B. A regular employee
- C. An independent contractor \*
- D. None of the above

10. Under this doctrine, a plaintiff is permitted to sue the parents of a driver who causes injury, even though the parent wasn't present in the car at the time of the accident.

- A. The Utter Purpose Doctrine
- B. The Manifest Purpose Doctrine
- C. The Independent Contractor Doctrine
- D. The Family Purpose Doctrine \*

11. This doctrine allows a plaintiff to bring suit against one business partner for the actions of the other.

- A. The Family Purpose Doctrine
- B. The Business Venture Doctrine
- C. The Joint Enterprise Doctrine \*
- D. None of the above

12. An evaluation of any case will take into account the following factors:

- A. The nature of the claim
- B. The type of injuries
- C. The quality of the opposing counsel
- D. All of the above \*

13. The general term for the responsibility of one person for the actions (or tort) of another

- A. Res Ipsa Loquitur
- B. Negligence per se
- C. Vicarious Liability \*
- D. None of the above

14. Under this doctrine, a plaintiff who has been injured by more than one defendant is permitted to sue both and seek his total damages against them individually and as codefendants.

- A. Respondeat Superior
- B. Res Ipsa Loquitur
- C. Negligence Per Se
- D. Joint and several liability \*

15. The term for a limitation period set by the legislature and can be found in the various state and federal codes.

- A. Statute of Frauds
- B. Statute on Perpetuities
- C. Statute of Limitations \*
- D. None of the above

16. A protection or advantage given to a class of persons for actions taken by them.

- A. Statute of Limitation
- B. Privilege \*
- C. Criminalization
- D. None of the above

17. An exception or privilege granted by the law to an action that ordinarily would result in a cause of action.

- A. Immunity \*
- B. Exception
- C. Repose
- D. None of the above

18. In almost all jurisdictions, a child under this age is not considered to be responsible for his actions.

- A. 21
- B. 18
- C. 13
- D. 7 \*

19. An overwhelming or irresistible impulse to do some action.

- A. Insanity
- B. Undue Influence
- C. Compulsion \*
- D. Duress

20. A defense when the person claims that he committed one type of harm in order to avoid a more serious harm.

- A. Necessity \*
- B. Compulsion
- C. Emotional Distress
- D. None of the above

21. When the defendant uses force, threat or intimidation to overcome the plaintiff's will or to compel the plaintiff to do (or not to) some action.

- A. Duress \*
- B. Necessity
- C. Compulsion
- D. None of the above

22. Which of the following people are incapable of giving consent?

- A. Children
- B. Mentally incompetent persons
- C. Intoxicated persons
- D. All of the above \*

23. When the parties to a fight voluntarily engage in violence.

- A. Self defense
- B. Compulsion
- C. Mutual Combat \*
- D. None of the above



24. Force used in self defense that is clearly disproportionate to the threat posed by another.

- A. Self defense
- B. Mutual combat
- C. Excessive force \*
- D. None of the above

25. When a paralegal offers legal advice.

- A. Unlawful solicitation
- B. Illegal advice
- C. Unauthorized practice of law \*
- D. None of the above

### True-False (10)

1. A defendant cannot use the defense of self defense when he uses of violence or force to protect another. (F)
2. Self defense is only available to a defendant after the defendant has been injured by another. (F)
3. A person can use deadly force to protect personal property. (F)
4. The "Family Purpose Doctrine" allows a plaintiff to sue the parents of a driver who causes injury, even though the parent wasn't present in the car at the time of the accident. (T)
5. The Family Purpose Doctrine can apply to individuals, such as live-in lovers, who are not strictly defined as a "family." (F)
6. Joint Enterprise allows a plaintiff to bring suit against one business partner for the actions of the other. (T)
7. An example of an independent contractor is a company employee. (F)
8. Under the doctrine of vicarious liability, an employee on a personal errand, or actually away from his job without permission, relieves the employer of liability. (T)
9. When an employee is acting within the scope of his employment when he injures the plaintiff, the employee's employer may be liable to the plaintiff as well. (T)
10. Respondeat superior refers to the doctrine of holding an employee liable for the actions of an employer. (F)

## Chapter 4

### Introduction to Negligence

#### Lecture Outline

*Outline discussion:* This chapter is an introduction to the basic concepts of negligence. The elements first introduced in this chapter: duty, breach, causation and damages, are developed in subsequent chapters.

#### Chapter 4 Outline

- I. Negligence: what makes it different?
- II. The History of Negligence
- III. The Chumley Case
- IV. The Four Elements of Negligence
  - A. Duty
  - B. Breach
  - C. Causation
  - D. Damages
  - E. Case Excerpt -- *Port Terminal R.R. Ass'n v. Richardson*, 808 S.W.2d 501 (1991)
- V. The Lawyers Who Represent Plaintiffs and Defendants
  - A. Becoming a Lawyer
  - B. The Economics of Law Firms
    1. Partnerships
  - C. Plaintiffs' firms
    1. Contingency fees
  - D. Defense firms
  - E. Contracting with a Law Firm
  - F. Contract in the Chumley Case
- VI. Obtaining Information from the Client
  - A. Authorizations from the client
  - B. Other information from the client: facts and photos
- VII. Skills You Need in the Real World: Meeting with the New Client
  - A. The first step: getting the information
  - B. Information about the court process
  - C. Videotapes
  - Skills You Need in the Real World: Meeting with the New Client
  - The Life of a Paralegal: Wendy Seagle
  - Chapter Summary
  - Ethical Issues for the Paralegal: Initial Client Meeting
  - Web Sites
  - Forms and Court Documents: A Typical Negligence Complaint

## Additional Web Resources

- An introduction to Negligence  
<http://www.duhaime.org/ca-negl.htm>
- International Bar Association – Negligence and Damages Committee  
<http://www.ibanet.org/general/CommHome.asp?section=SLP&Committee=SLP-13>
- Introduction to Negligence (PDF)  
<http://www.outlinebank.com/samples/sample388.PDF>

## Additional Assignments

1. The Internet and newspapers are almost always filled with examples of recent negligence cases, whether they are in the form of straightforward personal injury cases, or more complex actions such as products liability suits. Locate (or have your students locate) a recent news story and analyze the basic facts to see how the four elements of a negligence action could be satisfied.
2. Internet sites, such as Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs/>), have fascinating studies about the types of personal injury cases brought nationwide. Have your students investigate these various studies and prepare a written report or an oral presentation about the materials available.

## Answers to Review Questions

1. What are the four basic elements of a negligence case?  
  
In a negligence action, the four basic elements are: establishing a duty on the part of the defendant; showing how the defendant's actions (or inactions) violated that duty; demonstrating a direct connection between the defendant's actions and the resultant injury to the plaintiff and provable damages from the plaintiff's injury.
2. Under what circumstances does a person owe a duty to another?  
  
Duty can arise from a wide variety of situations. For instance, a person may owe another a duty because of occupation or through activity (such as driving on the public highways). Duty may also arise because of contractual obligation or because of a special relationship between the parties.
3. When we use the term 'causation,' what do we mean?  
  
Causation refers to proximate cause, the legal principle that there must be a direct, and close, factual connection between the defendant's actions and the resultant harm to the plaintiff.
4. What are the basic steps involved in investigating a new case?  
  
First, the firm should gather as much information from the client about the incident. Next, police reports and other official reports should be reviewed. Client information should be reviewed, pursuant to a client authorization for release of records.



5. What are some of the differences between plaintiffs' firms and defense firms?

Plaintiffs' firms generally work on contingency fees, meaning that they will not receive a fee unless the client wins some type of award. On the other hand, a defense firm is paid hourly.

6. What is a contingency fee?

A contingency fee is a fee that is paid out of the award in a case. The most common form of contingency is a 1/3 recovery. In such a situation, the firm would receive a total of 1/3 of the plaintiff's total recover.

7. List and explain some crucial information that you should obtain from a new client?

Besides obtaining medical and other authorizations, the client should also be queried about the basic facts of the incident and the existence of any witnesses, reports, photos or other corroborating information.

8. What is a medical authorization and when would it be required?

A medical authorization is a signed authorization by the client that permits the recipient to release otherwise confidential information to the firm representing the client.

9. List some of the ways of organizing a client's file.

A client's file could be organized in any of a number of ways. Most established firms have a pre-existing file organization scheme that should be followed. Most such firms will break down the file into sections such as correspondence, pleadings, legal memoranda, discovery, etc.

10. Is there a philosophical difference between plaintiffs' firms and defendants' firms?

Many would argue that there are profound philosophical differences between plaintiffs' firms and defense firms. Plaintiffs' firms are often seen as more adventurous and willing to take greater gambles than defense firms, which are usually seen as conservative.

11. How are negligence cases different from intentional tort cases?

The primary difference between intentional tort cases and negligence cases is that the allegations against the defendant in the former involve an intentional action by the defendant, i.e., the natural and probable consequences of his actions. In the latter, the defendant's intent is not a factor. In negligence actions, it is the defendant's failure to take reasonable precautions or to violate a standard of care that provides a cause of action.

12. When we discuss negligence, are we using this term as it is used in common parlance, or does it have a specific, legal meaning? If so, define it.

Negligence refers to the failure of the defendant to abide by a standard of care that results in an injury to the plaintiff.



13. What are some important pieces of information that should be obtained on the first meeting with a client?

On the first meeting with the client, all contact information, telephone numbers, mailing address, even email address, should be obtained. Additional information would include job history, family information, etc. For a complete client information checklist, see the Appendix to the text.

14. Why is a settlement package necessary and what is one way that it is put together?

A settlement package sets out the plaintiff's injuries, the basis of his legal claim and his demand for a specific amount to dispose of the case he has pending against the defendant. Putting together such a package is crucial for the plaintiff's team so that a demand can be made on the defendant and so that weaknesses in the plaintiff's case can be discovered.

15. What are some other methods for obtaining information about the cause of action?

The cause of action should be investigated not only through questioning witnesses, but also by a thorough review of all records made of the incident, including police and EMS records, medical records, ER admission records, etc.

### Answers to "Applying What You Have Learned"

1. X, an eleven-year-old boy, brings a suit against a priest alleging that the priest sexually assaulted him. His action is based on a claim of clergy malpractice and negligence. Does he have a valid negligence claim?

Answer: No. Since the facts alleged in X's complaint are really an intentional tort, a negligence claim is not valid. *Jones v. Trane*, 153 Misc 2d 822, 591 NYS2d 927 (1992)

2. Sally and Bill dated for several weeks. After they broke up, Sally discovered that Bill was HIV positive and failed to tell her. She has herself tested and although she doesn't test positive for AIDS or HIV, she brings a suit against Bill based on a negligence claim. Is this a valid claim under a negligence theory?

Answer: Although her claim would be valid if she actually did test positive for AIDS/HIV, her claim at this point is premature. Her claim satisfies the first two elements of a negligence claim (i.e., Duty and Breach), but she has failed to prove Causation. *Petri v. Bank of New York Co.*, 153 Misc 2d 426, 582 NYS2d 608 (1992)

3. Bill and Ted are police officers. While they are chasing an escaped mental patient, they are both injured. They file a negligence claim against the hospital from which the mental patient escaped. Will their claim succeed?

Answer: No. Since Bill and Ted are professionals whose job it is to subdue suspects, including escaped mental patients, they are barred from bringing suit against the hospital under this situation. *Santangelo v. State*, 71 NY2d 393, 526 NYS2d 812 (1988)

## Test Bank

### Essay Questions (5)

1. Explain the four, basic elements of a negligence action and provide a brief description of each.
2. What historical pressures contributed to the rise of negligence law?
3. David is driving his car and approaching the intersection of the street with a railroad crossing. David has a duty. What is it? Suppose that a locomotive is approaching the intersection. What duty does the locomotive engineer have?
4. Explain some of the steps that might be followed in investigating a basic negligence case.
5. Describe the basic financial arrangements made by plaintiffs' attorneys and their client and how these arrangements differ from those between insurance defense attorneys and their clients.

### Short Answer (10)

1. Explain duty.
2. How is a legal duty created?
3. Explain breach of duty?
4. What are some court-created doctrines that help establish breach of duty?
5. Explain causation.
6. Explain damages.
7. How can a defendant owe a duty to an anonymous stranger?
8. What is a contingency fee?
9. What is a settlement package?
10. How does a person become a lawyer?

### Multiple Choice (25)

1. The outcome that a person should have known or been able to anticipate or predict based on certain facts
  - A. Foreseeability
  - B. Damages
  - C. Negligence per se
  - D. Anticipatory breach

2. This century saw the most sweeping changes to negligence law.

- A. The 17<sup>th</sup> century
- B. The 18<sup>th</sup> century
- C. The 19<sup>th</sup> century
- D. The 20<sup>th</sup> century \*

3. Each of the following is an element of negligence, except for one. Which is not?

- A. Duty
- B. Intentional act
- C. Breach of duty
- D. Causation and Damages

4. The first element of a negligence claim. It is the legal obligation owed by the defendant to the plaintiff.

- A. Debt
- B. Duty \*
- C. Determinant
- D. Disability

5. One component of the defendant's obligation to the plaintiff is that the defendant could foresee that the plaintiff would be injured. Foreseeability is most closely associated with which of the four elements of negligence?

- A. Duty \*
- B. Breach
- C. Causation
- D. Damages

6. The plaintiff alleges breach of duty in the:

- A. Complaint \*
- B. Answer
- C. Interrogatories
- D. Appeal

7. The second element of a negligence action; also known as a violation of a standard of care.

- A. Duty
- B. Breach \*
- C. Causation
- D. Damages

8. The principle that the violation of a safety statute establishes a presumption of breach of duty in a negligence action.

- A. Respondeat Superior
- B. Negligence per se \*
- C. Res Ipsa Loquitur
- D. Malfeasance

9. When the defendant fails to live up to a legal standard, or violates a duty.

- A. Duty
- B. Breach \*
- C. Causation
- D. Damages

10. Proof of a direct, factual connection between the defendant's violation of the standard of care and the resultant injuries to the plaintiff.

- A. Duty
- B. Breach
- C. Causation \*
- D. Damages

11. The facts that show the defendant's legal responsibility for the injuries to the plaintiff

- A. Duty
- B. Breach
- C. Causation \*
- D. Damages

12. Also known as legal cause.

- A. Certain cause
- B. Specific cause
- C. Proximate cause \*
- D. Indirect cause

13. These are awarded as a way to attempt to put the plaintiff back into the condition he was in before the injury (or as close as possible).

- A. Damages \*
- B. Findings of fact
- C. Stipulations
- D. Assessments



14. All of the following are examples of damages except:

- A. Interlocutory order
- B. Medical payments
- C. Payments for lost time from work
- D. Payments for pain and suffering

15. The plaintiff has presented proof of the defendant's duty to him, the defendant's breach of that duty and the plaintiff's damages. He has failed to present any evidence on causation. What is the likely result of this case?

- A. The plaintiff will win because he has proven most of his case
- B. The plaintiff will win because he has proven the two most important elements, duty and breach of duty
- C. The defendant will win because the plaintiff did not present evidence of his intent
- D. The defendant will win because the plaintiff must prove all four elements of negligence \*

16. The type of fee arrangement typically seen between plaintiffs and their attorneys in negligence actions.

- A. Hourly rate
- B. Flat fee
- C. Commission
- D. Contingency \*

17. The type of fee arrangement typically seen between insurance companies and insurance defense firms

- A. Hourly rate \*
- B. Flat fee
- C. Commission
- D. Contingency

18. The American Bar Association is responsible for:

- A. Setting ethical guidelines and accrediting law schools \*
- B. Regulating attorneys
- C. Investigating and sanctioning attorneys
- D. All of the above

19. In order to practice law, a lawyer must

- A. Pass the state bar examination
- B. Be admitted to the state bar association
- C. Graduate from law school
- D. All of the above \*

20. Once a lawyer is licensed, he or she may

- A. Give legal advice
- B. Work as a sole practitioner
- C. Work for a large firm
- D. All of the above \*

21. In a typical law firm, the \_\_\_\_\_ usually split the yearly profits among themselves, after paying salaries and other operating costs.

- A. Associates
- B. Interns
- C. Partners \*
- D. Affiliates

22. The typical percentage of recovery in a contingency fee arrangement:

- A. 10%
- B. 25%
- C. 33% \*
- D. 50%

23. John is the plaintiff in a car wreck case. At the end of the trial, the jury finds for the defendant and awards John nothing. How much will his attorney collect under a contingency fee arrangement?

- A. \$0 \*
- B. Whatever hourly rate the attorney set
- C. Whatever amount the judge decides
- D. None of the above

24. When a defendant who has a standard automobile insurance policy is sued by a plaintiff, his insurance company:

- A. Hires an attorney to represent him \*
- B. Will reimburse him for any attorney he hires and pays himself
- C. Will not provide any funds for an attorney
- D. May opt not to provide an attorney for him

25. During the first meeting with a new client, or as soon as possible thereafter, a paralegal should obtain what type of information?

- A. The client's telephone number
- B. The client's mailing address
- C. The client's work telephone number
- D. All of the above \*

**True-False (10)**

- 1. At law firms, partners are paid flat rate salaries. (F)
- 2. A plaintiffs' firm is usually paid on a contingency fee basis. (T)
- 3. A medical authorization should be obtained from the client at the initial client meeting. (T)
- 4. Police accident reports are not an option for investigating a case. (F)
- 5. Clients should be given basic information about the court procedures. (T)
- 6. The Industrial Revolution had a profound impact on the law of negligence. (T)
- 7. Duty can only arise from a contractual relationship between the parties. (F)
- 8. Foreseeability involves proof of loss. (F)
- 9. Damages refers to the plaintiff's provable losses. (T)
- 10. A person's duty to another often depends on the nature of their relationship to one another. (T)

## Chapter 5

### Duty

#### Lecture Outline

*Outline discussion:* this chapter details the precise nature of one person's duty to another, whether this duty arises out of relationship, legal obligation or through the defendant's status, such as the possessor of real estate.

#### Chapter 5 Outline

- I. The Chumley Case: a dangerous intersection?
- II. The Legal Definition of Duty
  - A. When does a duty arise?
  - B. Using Formulas to Determine Duty
  - C. Duty Does Not Depend on Victim's Identity
  - D. Duty as a legal obligation
  - E. Duty does not arise from habit or custom
  - F. Duty Arising from Professional status
    - 1. Different Levels of Duty for some Professionals
    - 2. What is the standard of care for a professional?
    - 3. Specialists
  - G. Duty Arising Out of Other Factors
- III. How the courts determine duty
  - A. Relationship can determine duty
  - B. Special relationships
- IV. Duty from a social relationship?
  - A. Social Host liability
- V. Premises Liability
  - A. Duty is on possessor, not owner
  - B. Classifying visitors
    - 1. Trespassers
    - 2. Exceptions to the general rule of no duty to trespassers
      - a) The Attractive Nuisance Doctrine
        - i. Elements of the Attractive Nuisance Doctrine
      - b) Rescue Doctrine
  - C. Classifying visitors: Licensees
  - D. Classifying visitors: Invitees
    - 1. "Economic benefit" test
    - 2. Abnormally dangerous or ultra-hazardous conditions
  - E. Abolishing the categories (and distinctions) between invitees and licensees



F. Guest statutes

VI. Duty to Third Parties

A. Foreseeability of injury to third party

B. Case Excerpt: Tarasoff v. Regents of University of California

C. Can a defendant waive his duty?

- Skills You Need in the Real World: Beginning Your Legal Research
- The Life of a Paralegal: Christina Lynn
- Chapter Summary
- Ethical Issues for the Paralegal: Keeping up with Developments in the Law
- Web Sites
- Forms and Court Documents: Motion to Dismiss

**Additional Web Resources**

- Northern Illinois University College of Law

<http://www3.niu.edu/claw/library/other.htm>

- Legal Law Help

[http://www.legallawhelp.com/safety\\_and\\_health/toxic\\_mold/](http://www.legallawhelp.com/safety_and_health/toxic_mold/)

- Law Web Sites

<http://ejw.i8.com/lawweb.htm>

**Additional Assignments**

1. Does our state recognize the Attractive Nuisance Doctrine? If so, what are the elements of this doctrine? Please locate any cases and/or statutes that support your answer.
2. Explain which defendants in the Chumley case owed a duty to the plaintiff, and what the extent of that duty is.

**Answers to Review Questions**

1. What is a legal duty?

At its simplest, 'duty' refers to a person's obligation to conform his conduct to a particular standard of care.

2. How would you describe the relationship between the terms "duty" and "foreseeability?"

Under most circumstances, a person owes a duty to any person to whom his negligent behavior could foreseeably cause injury.

3. What duty is owed from one stranger to another?

Usually, strangers owe no duty to one another, but that general rule has some important limitations, including the rescuer doctrine, among others.

4. How do "special relationships" affect duty?

Some relationships, such as parent-child create a duty between the parties simply because of their relationship to one another. In such cases, relationship will determine not only the existence of a duty, but the extent as well.

5. X Company has adopted the custom of always double-checking its packaging before sending out its patented fruit cakes. One day, an inspector fails to notice that a piece of sharp metal has fallen into a fruitcake. Does X Company have a duty to inspect its product simply because it adopted the custom of always doing so?

Generally, custom or habit does not establish duty. However, when a company's practice is part of its normal course of business, or an accepted industry-wide practice, this can create a duty.

6. How is the legal duty of a professional different from that of a specialist?

Most jurisdictions define the legal duty of a professional as that reasonable degree of skill, knowledge and training that other professionals under similar circumstances in the professional community would exercise. However, for specialists, the duty is greater. The legal duty imposed on a specialist is what would be expected of a specialist with similar training under similar circumstances. Unlike the standard for a professional, the standard for a specialist is not tied to the geographic region where the specialist is found. A specialist is held to the highest standard and this standard is nationwide

7. List at least five professions that have a higher standard of care or duty than a layperson. Now explain why these professions have a higher duty.

Doctors, Lawyers, Accountants, Dentists, and Nurses all have a higher standard of care than a layperson. The reason is that they have specialized training and skills beyond that possessed by the mere layperson. With that greater degree of skill and training comes greater responsibility.

8. Explain what is meant by a "special relationship" under negligence law.

There are certain relationships that by their very nature impose an obligation on one person to the benefit of another. A parent's duty to a child arises from a special relationship. Like any relationship, however, the legal duty that one person owes to another changes over time.

9. What is the duty owed by the possessor of premises to a trespasser? Are there any exceptions to this rule?

The rule under the common law is that there is no duty to trespassers. Possessors of land have no obligation to make their property safe, or to take reasonable action to ensure the safety of people who trespass on the land. However, this rule is subject to certain exceptions, such as the attractive nuisance doctrine and the rescuer doctrine.

10. What is the difference between an invitee and a licensee? Give an example of both.

An invitee is someone who comes on to the defendant's property for a business purpose. A customer would be a prime example of an invitee. A licensee, on the other hand, is usually a guest, invited on to the property for a social reason.

11. Why was the court in the *Tarasoff* case willing to extend the doctor's liability to a third party?

The court cited several arguments for its holding that the doctor should have notified the victim's parents about his client's threat. One such reason is that a doctor, does, under certain circumstances owe a duty to third parties. The court also used foreseeability analysis to conclude that given the specific nature of the threat to an identifiable victim and the likelihood that the patient would carry out the threat, the doctor had a duty to warn.

12. What is the attractive nuisance doctrine? Why was this doctrine created?

The so-called "Attractive Nuisance Doctrine" was developed as a direct response to trespassing children. Courts developed this doctrine to specifically address dangerous conditions in areas that children would naturally find enticing.

13. Can a defendant waive his duty to a plaintiff? If so, under what circumstances would a waiver be valid? Under what circumstances would a waiver be considered invalid?

Waivers are not legally valid in some situations, such as the duty arising from a special relationship. Many jurisdictions have also said that it is not legal to attempt to contract against your own negligence. Waivers will also not be enforced when they run counter to public policy.

14. What is a "12(b)(6) motion?"

Such a motion is filed by the defense and alleges that the plaintiff has failed to present a claim for which the law authorizes a relief. Often captioned, "Failure To State A Claim on Which Relief May Be Granted," such a motion might be filed when the defendant wishes to dismiss the plaintiff's claim for failure to prove duty.

15. What is an "abnormally dangerous" or "ultra-hazardous" condition and how does this affect the analysis of the defendant's duty?

An abnormally dangerous condition would be keeping wild animals, storing dynamite or other explosives, or any other condition that is extremely dangerous. The term "ultra-hazardous" refers to situations that are very difficult to make safe and pose an extreme risk to anyone nearby. The manufacture of radioactive materials is one such example. When an abnormally dangerous condition exists, the defendant must take precautions to protect all three classifications of visitors from harm.



## Answers to “Applying What You Have Learned”

1. “True to Our Word” Burglar Alarm Company installed a state-of-the-art burglar system in High Art Galleries last year. Two nights ago, a burglar broke into the gallery by climbing through a skylight. He stole twenty paintings valued at over \$100,000. The skylight was not wired to the burglar alarm system. The gallery owners have found a safety expert who will testify that any professional would have wired the skylight and that failure to do so is a breach of the standard of care. Is this enough to show that the Alarm Company had a duty?

Yes. Since the Alarm Company held itself out as a professional safety company, the testimony of another safety expert would be enough to establish a breach of that duty.

2. Same facts as number one above, but with one slight change. When the Alarm Company installed the system, they had the gallery sign a contract that stated that they would not be liable for any break-ins or thefts that occurred because of unprotected “windows, doors or skylights.” Is this a valid waiver of their duty? If the gallery owners signed this contract, are they now barred from suing the Alarm Company?

Answer: Yes, they are barred from bringing suit. *Colnaghi, U.S.A., Ltd. v.. Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 595 NYS2d 381, 611 NE2d 282 (1993).

3. ABC Sign Company is in the business of designing large-scale billboards. They do not make the actual signs; they simply design what will go on them. They also do not install the signs. A different company is responsible for that. Sandy is a nurse at the local hospital and one evening, when she is leaving for work, a large sign falls on her and breaks both of her legs. Sandy sues ABC Sign Company for negligence, specifically alleging that ABC failed to inspect its sign. If the company had inspected the sign, they would have seen that several of the supporting bolts had rusted through. Sandy must establish that ABC had a duty to her. Can she prove it?

Answer: No. *Puente v A.S.I. Signs* (1991, Tex App Corpus Christi) 821 SW2d 400, writ den (Mar 25, 1992) and reh'g of writ of error overr (Apr 29, 1992)

## Test Bank

### Essay Questions (5)

1. Explain the concept of “Premises Liability”
2. Explain the “Attractive Nuisance” Doctrine
3. Describe how certain special relationships give rise to a higher standard of care.
4. How is the standard of care different among lay persons, professionals and specialists?
5. Explain the holding in *Tarasoff v. Regents of University of California*.



## Short Answer (10)

1. Explain the duty of a possessor to trespassers.
2. When does the Attractive Nuisance doctrine apply?
3. How is a specialist different from a professional?
4. Does habit or custom establish a standard of care?
5. What is the difference between a licensee and an invitee?
6. What is the "Rescuer Doctrine?"
7. What is a "12(b)(6) motion?"
8. Explain how you would begin a legal research project.
9. Under what circumstances can a defendant waive his negligent conduct?
10. What is "Social Host Liability?"

## Multiple Choice (25)

1. An obligation imposed by statute or common law.
  - A. Restriction
  - B. Venue
  - C. Duty \*
  - D. Caveat
2. The standard used to determine if a party has acted negligently in a particular case
  - A. Standard of proof
  - B. Standard of responsibility
  - C. Standard of measure
  - D. Standard of care \*
3. One way of determining when a person owes a duty to another is:
  - A. Determining if it was foreseeable that the plaintiff would be injured \*
  - B. Determining if the defendant has insurance coverage
  - C. Determining if the defendant was aware of the plaintiff's identity prior to the incident
  - D. None of the above
4. This famous judge established a mathematical formula to determine duty:
  - A. Judge Oliver Wendell Holmes
  - B. Judge Clarence Thomas
  - C. Judge Learned Hand\*
  - D. Judge Morton Smith

5. In the equation  $P \times L > B$  that was created as a way of evaluating whether or not the defendant owed a duty to the plaintiff, "B" represents what?

- A. Billing to the plaintiff
- B. Burden to the defendant\*
- C. Burden to the plaintiff
- D. None of the above

6. Ron is walking by a lake and sees Rick, a stranger, apparently drowning in deep part of the lake. Rick, clawing at the surface, yells out, "help! I'm drowning!" Ron, watching from the shore, does nothing to save Rick. Does Ron have a duty to save Rick?

- A. Yes, because Ron and Rick are in a special relationship
- B. No, because Ron and Rick do not like one another
- C. No, because Ron has no duty to a stranger \*
- D. Yes, because Ron has a moral obligation to act

7. A practice that has acquired a legal status over time such that failing to follow the practice would result in liability.

- A. Habit
- B. Specialty
- C. Perquisite
- D. Custom \*

8. This category of individuals have a duty that arises simply because of their education, training or job status.

- A. Lay persons
- B. Amateurs
- C. Professionals \*
- D. None of the above

9. The legal duty that requires: a reasonable degree of skill, knowledge and training that other professionals under similar circumstances in the professional community would exercise.

- A. The lay person's standard of care
- B. The specialist's standard of care
- C. The professional's standard of care \*
- D. None of the above

10. This category is held to the highest standard of care:

- A. Professionals
- B. Amateurs
- C. Novices
- D. Specialists \*

11. When the court determines a defendant's duty, it may consider which of the following?

- A. How difficult it would have been for the defendant to avoid injuring the plaintiff
- B. The economic burden on the defendant to avoid the situation
- C. Whether imposing such a duty would open up a flood of new litigation
- D. All of the above \*

12. Which of the following relationships is not considered to be a "special relationship" as that term is defined in chapter 5?

- A. Employer and employee
- B. Friend and friend \*
- C. Landlord and tenant
- D. Spouse and spouse

13. The duty that some jurisdictions impose on a person, such as the person who is throwing a party, to take some responsibility for regulating the behavior of the other partygoers.

- A. Partygoer liability
- B. Social host liability \*
- C. Social setting liability
- D. None of the above

14. A premises liability suit:

- A. Can only be brought against the property owner
- B. Can be brought against the possessor the real estate \*
- C. Must be brought by a plaintiff who has a property interest in the real estate in question
- D. None of the above

15. A person who visits the property with a business purpose

- A. Invitee \*
- B. Licensee
- C. Trespasser
- D. None of the above

16. The type of duty owed by a possessor of land to a trespasser:

- A. The duty to warn of dangerous conditions
- B. The duty to warn of dangerous conditions and to make them safe
- C. The duty to warn, make safe and take reasonable steps to keep the trespasser from injuring himself
- D. Under the common law, there is no duty to trespassers \*

17. Courts developed this doctrine to specifically address dangerous conditions in areas that children would naturally find enticing.

- A. The bona fide purchaser doctrine
- B. The "tender years" doctrine
- C. The "loving care" doctrine
- D. The "attractive nuisance" doctrine \*

18. Another exception to the general rule of no duty to trespassers involves people who are attempting to save others from danger. This doctrine is called:

- A. The Rescuer doctrine\*
- B. The Savior doctrine
- C. The Good Samaritan doctrine
- D. None of the above

19. An example of a location that would qualify for coverage under the Attractive Nuisance doctrine.

- A. A railroad yard
- B. A construction site
- C. A bridge under repair
- D. All of the above \*

20. The Attractive Nuisance doctrine was created to help what category of defendants?

- A. Innocent trespassers
- B. Child trespassers\*
- C. Mentally incompetent invitees
- D. Senile licensees



21. When the possessor of real estate's duty to the plaintiff is not only to warn of dangerous conditions, but also take reasonable actions to make the premises safe. The plaintiff is classified as:
- A. An invitee \*
  - B. A licensee
  - C. A trespasser
  - D. A child
  - E.
22. In some situations, a possessor of real estate may be liable to all three categories of visitors. What is an example of such a situation?
- A. When he is running a business on the premises
  - B. When the premises are his personal residence
  - C. When he has an abnormally dangerous condition on his premises \*
  - D. All of the above
23. When a contract purports to waive a claim by the plaintiff for "any and all" negligence by the defendant, how will the courts interpret this language?
- A. They will rule that the contract is illegal and unconstitutional
  - B. They will strictly interpret the contract and apply any ambiguity against the defendant\*
  - C. They will not inquire into the legal sufficiency of the contract
  - D. None of the above
24. What is one of the best ways to begin your legal research?
- A. Start with a list of key words having to do with your subject \*
  - B. Go directly to case law
  - C. Start by drafting a legal memoranda containing your thoughts on the subject
  - D. None of the above
25. What is a method of keeping up with legal developments in a particular area of law?
- A. Read legal newspapers
  - B. Read legal journals
  - C. Read recent appellate decisions
  - D. All of the above \*

### **True-False (10)**

1. The term "invitee" refers to the person's status as an invited guest on the premises. (F)

2. The Attractive Nuisance doctrine holds that a defendant can be liable when he is attracted to a dangerous condition. (F)
3. The *Tarasoff* case established social host liability. (F)
4. The general rule that there is no duty to third parties is slowly changing in many jurisdictions to a duty to third parties under certain, specific circumstances. (T)
5. Some states have abolished the distinction between invitees and licensees. (T)
6. An invitee is a customer or a client. (T)
7. A licensee is a person who enters another person's premises convenience, curiosity or entertainment. (T)
8. The rule under the common law is that there is no duty to trespassers. (T)
9. The jury determines the question of who is or is not in a special relationship with the plaintiff. (F)
10. Relationship often determines duty. (T)



## Chapter 6

### Negligence: Breach

#### Lecture Outline

*Outline discussion:* this chapter details the various court-created doctrines to help determine when a defendant has breached his duty to the plaintiff. Students should be able to define standards such as the reasonable person standard and explain the critical doctrines of res ipsa loquitur and negligence per se.

#### Chapter 6 Outline

- I. Introduction
- II. Who Breached a Duty in the Chumley Case?
- III. Breach of duty
  - A. The Objective Standard
  - B. The Jury Determines the Standard of Care
  - C. Physical characteristics
  - D. Other situations in which the standard of care is lowered: Emergencies
  - E. Custom or tradition to establish breach of duty?
- IV. Professionals have a higher standard of care
  - A. Specialists
- V. Court doctrines that help to determine breach of duty
  - A. Res Ipsa Loquitur
    1. The Common Sense Element of Res Ipsa Loquitur
    2. Defenses to a Res Ipsa claim
    3. Pleading Res Ipsa Loquitur: What Your Complaint Should Allege
  - B. Negligence Per Se
    1. What your complaint should say about Negligence Per se:
- VI. Case Excerpt -- *City of Kennett v. Akers*, 564 S.W.2d 41 (1978)
- VII. Expert Evidence and Breach of Duty
- Skills You Need in the Real World: Locating Expert Witnesses
  - A. Locating Expert Witnesses
    1. Word of Mouth
    2. The Pro Who Beat You Last Time
    3. Listings maintained by the Bar
    4. Other prominent cases
    5. Associations
    6. Advertisements & the Internet
- Skills You Need in the Real World: Locating Expert Witnesses
- The Life of a Paralegal: Gwyn Huffman



- Chapter Summary
- Ethical Issues for the Paralegal: Confidentiality
- Web Sites
- Forms and Court Documents: Excerpt from Chumley Complaint

## Additional Web Resources

- Cornell Law

<http://www.law.cornell.edu/topics/torts.html>

- Duty/Breach of Duty

<http://www.netlawlibraries.com/sums060800.html>

## Additional Assignments

1. Does your state follow the Res Ipsa doctrine? Locate cases and/or statutes that provide the answer.
2. We have a client who was injured at a local nightclub. It seems that while she was dancing, a large speaker suddenly came loose from its supports and fell on her. She's heard of Res Ipsa Loquitur, and I would like to know if there are any cases in our jurisdiction that are on point. Is this a Res Ipsa case? Explain your answer and identify the case that provides the answer.

## Answers to Review Questions

1. Can we use Res Ipsa or Negligence Per Se doctrines in the Chumley case? Explain why or why not.  
  
Either claim is difficult to prove. In the first case, we can certainly say that a train striking a car is not an action that usually occurs, but the other elements of a res ipsa claim are missing. Under negligence per se, the locomotive engineer was not violating any statutes at the time of the collision. Therefore, that doctrine will not work in the Chumley case.
2. Explain the court's reasoning in *City of Kennett v. Akers*. Why does the court consider this case to involve res ipsa loquitur?  
  
The court held that a falling radio antenna was an unusual occurrence that would not normally occur absent negligence and that the defendant had exclusive control over it
3. In any given situation, once you have determined that a duty was owed, how do you determine if a breach of that duty has occurred?  
  
You must determine the standard of care that the defendant was bound to follow and then analyze how the defendant violated that standard of care.

4. What is the reasonable person standard and how does it help determine breach of duty?

The reasonable person standard is a test used by courts to provide a yardstick by which they can evaluate the defendant's actions in a particular case. Obviously, the court is basing its decision on the fact that a hypothetical, reasonable person would not take any action that would cause an unreasonable risk of harm to other people.

5. How does "standard of care" apply to breach of duty?

Only when the standard of care has been determined can the defendant's actions be evaluated to see if he has violated it. Under most situations, the standard of care is what a reasonably prudent person would have done under the same circumstances as the defendant.

6. In determining a breach of duty, you must look at the facts objectively. Why?

Because defendants could always justify their actions on a subjective basis.

7. Mental characteristics of tortfeasors are not taken into account, but physical characteristics, such as blindness, often are. Why does the law make this distinction?

Tort law seems to have a bias towards characteristics that are more easily defined. It is easy to tell if a person is paralyzed or not. It is much harder to determine if someone is suffering from an emotional or psychological problem. Mental characteristics are much harder to determine and in such cases courts usually opt for a uniform standard. However, when a characteristic is easily defined, such as the fact that the defendant is a child, courts will usually take that characteristic as the basis to modify the defendant's standard of care.

8. Can custom establish a breach of duty? Why or why not?

Generally, no. Custom or habit will not determine a standard of care, although it can have an effect on judgments in products liability cases.

9. Should a judge determine the standard of care instead of a jury? Why or why not?

This answer will vary by the students' opinions.

10. A professional is held to a higher standard than a layperson. What is that standard? How is that standard different for specialists?

The standard of care for a professional is often stated as what any other professional, in good standing, would do under similar circumstances.

11. Explain Res Ipsa Loquitur. Why was this doctrine ever created?

The doctrine was originally created as a way to avoid injustice in situations where the plaintiff cannot prove exactly how the defendant was negligent, primarily because the instrumentality that caused the plaintiff's injuries was within the complete control of the defendant.

12. What are some of the defenses available to a claim of res ipsa loquitur?

A defendant should attack the individual elements of a res ipsa claim; contributory negligence is also a defense in jurisdictions that still allow it.

13. What is the doctrine of Negligence Per Se? Why was this doctrine created?

Under Negligence Per Se, the plaintiff can prove a breach of duty by showing that the defendant violated a statute. It was created out a need to ascribe a standard of care to a defendant who had violated a safety statute that was specifically designed with security and safety in mind.

14. How is res ipsa loquitur different from negligence per se?

In res ipsa, the plaintiff is attempting to create a presumption of negligence based on an unusual occurrence, where the instrumentality is exclusively within the control of the defendant. In negligence per se, the plaintiff is attempting to raise a presumption of negligence where the defendant violated a safety statute.

### **Answers to “Applying What You Have Learned”**

1. Using the following facts, draft a complaint alleging Res Ipsa Loquitur:

Our firm represents the estate of a passenger who was killed in a plane crash. The plane crashed into the sea and very little evidence has been recovered, especially in regard to what caused the crash.

The specifics of this complaint will vary by student response.

2. Using the following facts, draft a complaint alleging Negligence Per Se.:

In the Chumley case, assume that the train engineer was exceeding the posted speed limits for trains, by traveling 30 mph when 25 mph was the restricted speed limit.

The specifics of this complaint will vary by student response.

3. Tom is home one afternoon and notices that the local telephone company is replacing a telephone pole on the corner of Tom's lot. Two hours after the workers complete the installation of the new telephone pole, it falls, crushing Tom's roof and injuring Tom. Does Tom have a negligence per se claim? Go through each element of negligence per se and prove/disprove the elements.

No, Tom does not a negligence per se claim. For one thing, there is no evidence that the defendants violated a safety statute. A better claim would be a res ipsa claim. The facts of this case would seem to easily lend themselves to such a claim.



## Test Bank

### Essay Questions (5)

1. Explain how under what circumstances the objective standard is used and how it differs from the subjective standard used to determine if a defendant has breached his duty.
2. Explain how "standard of care" relates to breach of duty.
3. Explain how the town of Cling and the National Railroad Co. could have been reached its duty in the Chumley case.
4. Explain Res Ipsa Loquitur
5. When, and under what circumstances, is negligence per se applied?

### Short Answer (10)

1. Can an attorney be compelled to testify about what his or her client has told him? Why or why not?
2. What are some of the methods you might use to locate an expert witness?
3. Why is an expert witness permitted to give an opinion about the ultimate issues in a case?
4. What are some of the elements that a complaint based on negligence per se should allege?
5. Explain the steps you would follow to locate an expert witness to testify in your case.
6. Why do the courts generally frown on the use of the subjective standard to evaluate the defendant's actions?
7. Why is there a requirement in res ipsa loquitur cases that the instrumentality that causes the plaintiff's injuries be under the exclusive control of the defendant?
8. When is the protection of confidentiality triggered between a client and an attorney?
9. What are some allegations that a complaint alleging negligence per se should contain?
10. What types of defenses are available in Res Ipsa Loquitur cases?

### Multiple Choice (25)

1. The legal principle that states that negligence may be inferred when the defendant violates a safety statute during the incident that injured the plaintiff.
  - A. Respondeat Superior
  - B. Res Ipsa Loquitur
  - C. Negligence Per Se
  - D. Presumed Negligence



2. Which of the following is not an element of negligence per se?
- A. That the defendant violated a safety statute
  - B. That the statute was designed with safety in mind
  - C. That the defendant's violation of the statute was a major factor in the plaintiff's injuries
  - D. That the defendant was sentenced for his safety violation \*
3. All of the following are elements of a Res Ipsa Loquitur claim, except:
- A. That the event is one that ordinarily would not occur without someone acting negligently
  - B. That the plaintiff acknowledged that an injury was possible before it occurred \*
  - C. That the event was caused by some instrumentality exclusively in the defendant's control
  - D. That the event was not caused, even in part, by the plaintiff's actions or failure to act
4. The advantage of a complaint based on res ipsa loquitur is:
- A. That the plaintiff is not required to prove damages
  - B. That the plaintiff is automatically entitled to a judgment in his/her favor
  - C. That the defendant is presumed to have acted negligently
  - D. That the court can immediately assess liability without reference to the jury's verdict
5. Res ipsa loquitur actually means:
- A. The thing speaks for itself
  - B. Let the master respond
  - C. Let the buyer beware
  - D. Proximate cause
6. A professional who has achieved the highest level of training and expertise in a given field
- A. Technician
  - B. Novice
  - C. Initiate
  - D. Specialist \*

7. What is the standard of care for a specialist?

- A. What any other specialist with similar training and background would have done under similar circumstances \*
- B. What a safety statute dictates that the specialist should do
- C. The standard of care for a specialist is the same as that for any other professional
- D. None of the above

8. What is the standard of care for a professional?

- A. The standard of care is no different for a professional than it is for a layperson
- B. The degree of care exercised by the most advanced and educated member of the profession
- C. The degree of care and skill exercised by the least skilled member of the profession
- D. The degree of care, skill and proficiency that would be exercised by a similar professional faced with the same or similar circumstances\*

9. Someone who either through education, training or a combination of both, possesses skills that an average person does not.

- A. Layperson
- B. Specialist
- C. Novice
- D. Professional \*

10. How does the standard of care change in an emergency situation?

- A. It does not change
- B. Any behavior is acceptable in an emergency
- C. The standard of care is modified; people are not expected to exercise the same degree of care and skill \*
- D. None of the above

11. How is the standard of care affected when a person acts in an unusually brave manner or manifests an unusual degree of strength or skill to assist another person?
- A. The standard of care for everyone else is raised
  - B. The standard of care for others is not affected \*
  - C. The standard of care is actually lowered for others
  - D. None of the above
12. In a typical trial, who determines the standard of care?
- A. The judge
  - B. The jury \*
  - C. The defendant
  - D. The plaintiff
13. Matt is driving home one day and as he crosses a bridge, it suddenly collapses. Matt is injured and wishes to sue. This case sounds like a classic example of:
- A. Negligence Per Se
  - B. Respondeat Superior
  - C. Caveat Emptor
  - D. Res Ipsa Loquitur \*
14. What is the second element of a negligence action?
- A. Duty
  - B. Causation
  - C. Breach of duty \*
  - D. Damages
15. In preparing to give his testimony, an expert witness might refer to which of the following:
- A. Discovery materials
  - B. Depositions
  - C. Police and other accident reports
  - D. All of the above \*

16. One way of determining whether or not a defendant breached his duty of care to the plaintiff is:

- A. By inquiring into the defendant's subjective intent
- B. By evaluating the defendant's actions and comparing them to what a reasonable person would have done under similar circumstances\*
- C. By asking the defendant's friends and acquaintances about his practices
- D. None of the above

17. The reasonable person standard:

- A. Is a test to determine whether the defendant is a reasonable person
- B. It's a test to determine if the defendant's actions were the same as those of a reasonable person \*
- C. Is not a test that is permissible in any jurisdiction
- D. Is only available to defendants will have caused motor vehicle accidents

18. Standard of care refers to:

- A. The parameters of what the defendant's actions should have been toward the plaintiff \*
- B. The acts taken by the defendant in any particular case
- C. The conduct of the plaintiff during the lawsuit
- D. The standard that must be used private medical and legal professionals only

19. Who is responsible for determining whether or not the defendant's actions fell within the applicable to standard of care?

- A. The defendant
- B. The plaintiff
- C. The jury \*
- D. The appellate court

20. In determining whether or not the defendant violated the applicable standard of care, the fact-finder is permitted to take into account which of the following characteristics?

- A. The defendant's subjective intent
- B. Unusual or stressful events surrounding the incident \*
- C. The defendant's nervousness
- D. All of the above



21. Ron is blind. How does his blindness affect his standard of care?
- A. His blindness will have no effect on his standard care
  - B. His standard of care will be that of a reasonable, blind person \*
  - C. Ron cannot be sued
  - D. None of the above
22. An event that normally would not occur without negligence.
- A. Respondeat superior
  - B. Res gestae
  - C. Res judicata
  - D. Res Ipsa Loquitur \*
23. A person who has achieved the highest level of training and expertise in a given field
- A. A novice
  - B. A specialist \*
  - C. A trainer
  - D. None of the above
24. Rick witnesses a car wreck and rushes to help one of the injured parties. While he is assisting the injured driver, he accidentally breaks the man's ribs. The man later sues Rick claiming that he violated a standard of duty to him. What is the likely result of this claim?
- A. Rick will lose because he actually did break the man's ribs
  - B. Rick will lose because he had no business to go to the injured man
  - C. Rick will win because his conduct is protected by the "Good citizen" exception
  - D. Rick will win because the standard of care in this situation is lower because it is an emergency \*
25. When the plaintiff can prove a breach of duty by showing that the defendant violated a statute.
- A. Tort per se
  - B. Violation per se
  - C. Jurisdiction per se
  - D. Negligence per se \*

## True-False (10)

1. A lay witness can give an opinion about an ultimate issue in the case during his testimony. (F)
2. An expert witness can give an opinion about breach of duty in his testimony. (T)
3. When the plaintiff presents proof of his injury, this will also prove breach of duty. (F)
4. One way of determining if the defendant breached his duty to the plaintiff is by a determination of whether or not the defendant caused an unreasonable risk of harm to the plaintiff. (T)
5. A defendant is required to exercise greater care for the plaintiff than the plaintiff is required to exercise on his own behalf. (F)
6. Determining breach of duty is always an easy task in any negligence case. (F)
7. If the court determines that the defendant violated the reasonable person standard, the court can rule that the defendant breached a duty. (T)
8. There are situations in which the hypothetical, reasonable person standard is difficult, if not impossible, to apply. (T)
9. A person's physical characteristics, such as a handicap, will affect his standard of care. (T)
10. A person with lower than average intelligence receives the benefit of a lower standard of care. (F)



## Chapter 7

### Negligence: Causation

#### Lecture Outline

*Outline discussion:* Here we approach the sometimes-complicated issue of legal and factual causation. The differences are explained, and then the significance of proximate cause is explained.

#### Chapter Outline:

- I. Proximate cause in the Chumley case
- II. Introduction
  - A. Proving Proximate Cause
    - 1. Breach of duty of care
    - 2. Breach was the cause
  - B. The Law on Proximate Cause Tends to be Vague
- III. Developing the concept of proximate cause
  - A. Historical development of proximate cause
  - B. Problems defining Proximate Cause
  - C. Working Definition of Proximate Cause
    - 1. Discussing the elements of the working definition
      - a) Proof of an injury caused by the defendant
      - b) In a natural, unbroken and continuous sequence
      - c) Uninterrupted by any intervening causes
      - d) Produced the plaintiff's injuries
      - e) Without which the result would not have occurred
    - 2. Restatement position on defining proximate cause
  - D. Proximate cause requires a close connection between the defendant's actions and the plaintiff's injuries
    - 1. Remote causes are less likely to be considered proximate cause
    - 2. Remote causes are harder to prove
    - 3. Proximate cause depends on the facts in the case
    - 4. Evaluating a case for Proximate Cause
  - E. Proximate cause must show that the defendant is responsible
  - F. Foreseeability
    - 1. The Palsgraf case
    - 2. Case Excerpt – Palsgraf v. Long Island Railroad Co.
      - a) An analysis of Palsgraf
      - b) "Orbit of the risk" doctrine (foreseeability)
    - 3. Defining foreseeability after Palsgraf
- IV. Court-created tests for Proximate Cause
  - A. "But for" test
  - B. "Substantial factor" test
    - 1. Case Sample: Firman v. Sacia, 7 A.D.2d 579 (1959)



## V. Pleading proximate cause

A. Is proximate cause a defense?

B. In the end, proximate cause is a jury question

1. Sample Jury instructions

2. How much evidence does the plaintiff have to produce to make proximate cause a jury question?

3. On appeal, courts will leave jury's determination intact, unless clearly wrong

## VI. Multiple defendants and Proximate Cause

A. When there are two defendants, but only one could be negligent

## VII. Intervening causes

A. Superseding causes

B. Acts of God/Nature

- Skills You Need in the Real World: Internet Legal Research
- Life of a Paralegal: Pam Tallent
- Chapter Summary
- Ethical Issues for the Paralegal: Attorney-Client Privilege
- Web Sites
- Forms and Court Documents: Complaint form, emphasizing proximate cause

## Additional Web Resources

- Findlaw.com (What is proximate cause and a breakdown by state)

[http://biz.findlaw.com/states\\_new.html](http://biz.findlaw.com/states_new.html)

- Michigan Law Review

<http://www.milegislativecouncil.org/mlrc/1996/proxi.htm>

- The Locke Institute

<http://www.thelockeinstitute.org/journals/tortliability8.html>

## Additional Assignments

1. Choose the facts of a recent, local car wreck case and analyze it for proximate cause.
2. Have the students do an Internet search under the term proximate cause and review the information (and misinformation) available on the web.

## Answers to Review Questions

1. What is proximate cause?

The facts that show the defendant's legal responsibility for the injuries to the plaintiff, also known as legal cause.

2. How does proximate cause differ from the proof of the series of events in the case?

Proximate cause apportions blame or responsibility while proof of the events does not.

3. Some commentators suggest that the law on proximate cause is deliberately vague. Why would this be so?

The reason that proximate cause tends to be vague is to allow room for social policy concerns to creep into the analysis and to reflect changes in society.

4. What are three arguments in support of proximate cause?

1) proximate cause is the only way to apportion responsibility for the defendant's actions, 2) proximate cause assess responsibility based on the predominant cause of the plaintiff's injuries, 3) proximate cause is necessary to not only apportion responsibility, but also to allow an end to a defendant's responsibility for a chain of events.

5. Why should a defendant's liability be limited only to proximate causes?

Society as a whole needs closure on specific cases, even when this closure limits a particular plaintiff's ability to recover for all possible losses tied to the defendant's negligence. Without this closure, cases could resurface for years, causing no end of confusion.

6. Some authors refuse to use the term proximate cause, preferring, instead, legal cause, or responsible cause. Are these labels more descriptive? Why or why not?

Although portions of this answer will depend on students' opinions, there are some predictable aspects to this answer. For one thing, legal cause has been suggested by authorities because it is a more accurate description of the analysis that is actually going on.

7. Why would one of the requirements of a working definition of proximate cause involve the proof of a "natural, unbroken and continuous sequence" of events?

This requirement was created in order to assure that the defendant was the primary and predominate cause of the plaintiff's injuries and to deal with any interceding or superceding causes.

8. Explain the difference between the "but for" test and the "substantial factor" test.

The "but for" test states that *but for* someone's negligence the plaintiff would not have been injured. The substantial factor test mandates that a defendant will be liable to the plaintiff if the defendant's actions were a primary factor in the plaintiff's injuries. They are different not only in the degree of care, but also in the extent of proof required at trial.

9. Explain foreseeability.

The concept of foreseeability encompasses the view that a defendant should only be liable for a plaintiff's injuries when the defendant's actions (or failure to act) would likely result in the kind of injuries that the plaintiff sustained.

10. Explain the “orbit of the risk” doctrine from Palsgraf.

Under the “orbit of the risk” doctrine, a defendant is responsible for the plaintiff’s injuries when the plaintiff is a person whom the defendant could have foreseen could potentially be placed in danger, or in the orbit of risk, by his negligent actions.

11. Why is the Palsgraf case considered to be so important?

This case established the “orbit of the risk” doctrine and also gave a complete explanation of foreseeability.

12. Would the analysis of the Palsgraf case been different if the man attempting to board the train had carried a box labeled, “Dangerous Explosives: Do Not Drop?” Explain.

In such a case, the danger of helping the man onto the train would have been more obvious to the conductor and could have brought the plaintiff into the zone of foreseeability.

13. Describe how the defendants in the Chumley case are the proximate cause of the plaintiff’s injuries by detailing the precise facts that give rise to their liability.

Although this answer will vary with student analysis, there are some given facts: 1) the plaintiff was in a class of people to be protected, i.e., motorists crossing at the railroad junction; 2) the railroad knew of this risk, because of prior occurrences, the presence of warning signs at the intersection and its own policies when approaching the intersection; 3) when the locomotive struck the plaintiff’s car, there were no other contributing, superceding or intervening causes of the plaintiff’s injuries, with the possible exception of the plaintiff’s own negligence.

14. Is there a justification for altering the rules of proximate cause to limit them to the immediate injuries caused by the defendant? If so, justify this position based on the concepts in this chapter.

Answers will vary according to student opinion, but an answer to this question should at least include some of the following: the advantage to society of limiting the defendant’s responsibility and the impracticability of proving damages far removed from the defendant’s negligent actions.

15. Explain proximate cause analysis when two or more defendants are implicated, but only one could have been negligent.

When the plaintiff is injured by the negligence of Defendant A and then receives additional injuries because of Defendant B’s negligence, Defendant A is not absolved of liability. In such a case, both defendants may be liable to the plaintiff, each for the injuries his negligence proximately caused.



16. How does an act of nature affect the proximate cause analysis?

When the plaintiff is injured in an act of nature, the plaintiff cannot sue any specific person for his injuries.

17. How is the Restatement position on proximate cause different than the approach used in other jurisdictions?

According to the Restatement, under proximate cause a defendant may be liable for the harm to the plaintiff from his conduct, as long as he is the legal cause of the harm. This differs from the interpretation of other jurisdictions which may require that the defendant be a substantial factor in the plaintiff's injuries, or satisfy the "but for" test of causation.

**Answers to "Applying What You Have Learned"**

1. Assuming that we can prove that Mr. Chumley stopped at the railroad crossing, looked, but could not see the oncoming train because of obscuring vegetation, draft a paragraph explaining how the Railway Company is the proximate cause of his injuries.

The response to this question will vary according to the student.

2. Explain the court's reasoning in the *Firman v. Sacia* case. Would the court's reasoning have been different if the first accident that injured the child and the second incident involving the shooting had been separated by seven minutes instead of seven years?

One could argue that it is the length of time that affects the proximate cause analysis, but the court in *Firman* seems to be saying that it is not foreseeable that the child would shoot another person after the child was injured in a car wreck. Under that interpretation, the length of time would be irrelevant.

3. June is driving home on January 10<sup>th</sup> of this year and comes to a stop at a red light at an intersection in the Town of Lucy, Barnes County, State of Placid. She is on State Street. The intersecting road is called Dellinger Boulevard. As she waits for the light to turn green, a 2002 Ford Explorer SUV driven by Randy Reckless approaches from the east on Dellinger Boulevard and runs the red light. June, who sees that the light in her direction has turned green, begins to accelerate and reaches the intersection just as Randy Reckless runs the red light. Randy's car slams into June's car, striking her car on the driver's side. June is pinned inside the car and it takes over two hours to get her out. When the local fire department finally frees her, they discover that June has numerous broken bones and internal injuries. Police cite Randy for failing to stop at the red light, failure to yield and reckless driving.



Draft a complaint based on these facts and pay particular attention to your allegation of proximate cause. How do you allege proximate cause under these facts?

The response to this assignment will vary according to the student.

## **Test Bank**

### **Essay Questions (5)**

1. Explain the concept of proximate cause.
2. Explain how the concepts of intervening cause and superceding cause affect proximate cause analysis.
3. Compare and contrast the “but for” test and the substantial factor test.
4. Compare and contrast statutes of limitation to the limitations of proximate cause.
5. Explain the rationale in the Palsgraf graph case

### **Short Answer (10)**

1. Why have some commentators suggested the substitution of the term legal cause for proximate cause?
2. What is the substantial factor test?
3. What is the but-for test?
4. Explain superceding causes.
5. What is an intervening cause?
6. Why is proximate cause one of the elements in a negligence case?
7. Explain how a determination of the facts of the case can help prove or disprove proximate cause.
8. What is the relationship between foreseeability and proximate costs?
9. Explain the “orbit of the risk” doctrine.
10. What is the significance of the Palsgraf case?

### **Multiple Choice (25)**

1. The term used to describe the defendant’s responsibility for his breach of duty and resultant injuries to the plaintiff.
  - A. Ultimate cause
  - B. Proximate cause \*
  - C. Succeeding cause
  - D. Factual cause

2. The legal test used to determine proximate cause that dictates that the defendant who was a prominent or a major cause of the plaintiff's injuries will be the defendant who is liable.

- A. The "but for" test
- B. The factual test
- C. The legal test
- D. The substantial factor test \*

3. The legal test used that dictates liability for a defendant when the court determines that had it not been for the defendant's actions, the plaintiff would not have been injured.

- A. The "but for" test \*
- B. The factual test
- C. The legal test
- D. The substantial factor test

4. The fourth element of a negligence claim:

- A. Proximate cause\*
- B. Duty
- C. Breach of duty
- D. Damages

5. The American view of proximate cause most closely resembles that of which other country?

- A. France
- B. Spain
- C. Germany
- D. England \*

6. The public policy concerns about limiting the defendant's scope of responsibility under proximate cause most closely resembles what other principle of law?

- A. Statutes of limitation \*
- B. Venue
- C. The subject matter jurisdiction
- D. Appellate jurisdiction

7. The term "proximate cause" was first developed by:

- A. Oliver Wendell Holmes
- B. Thomas Jefferson
- C. Lord Bacon \*
- D. None of the above

8. One of the problems with proximate cause is that:

- A. There is no standard formula that can apply in all cases
- B. It is often difficult to apply to the facts of a specific case
- C. It suggests that only those causes closely connected in time will result in liability
- D. All of the above \*

9. Some commentators have suggested that the concept of proximate cause is deliberately vague. What is one reason why this would be so?

- A. In order to make it easier for the defended to avoid responsibility for negligent actions
- B. In order to allow the jury to apply public policy and societal concerns in particular cases \*
- C. Because the courts in the United States are notoriously anti plaintiff
- D. Because there's never been a definition of proximate cause

10. Some scholars have stated that the term proximate cause is inaccurate. They suggest replacing it with another term. What is that term?

- A. Legal cause \*
- B. Remote cause
- C. Plaintiff's cause
- D. Cause in the case

11. A concept that has been called one of the most confusing and difficult to apply in all of negligence law.

- A. Duty
- B. Breach of duty
- C. Proximate cause \*
- D. Damages

12. Each of the following statements contains one of the elements of the most widely accepted definition proximate cause. Which one is not?

- A. Proof of the injury caused by the defendant's negligence
- B. That occurred in a natural end on a broken continuous sequence
- C. That was uninterrupted by any other intervening cause
- D. That included the plaintiff's own negligence \*

13. One of the basic premises of proximate cause is that there was an unbroken, natural chain of events between the defendant's negligent act and the plaintiff's subsequent injury. Which of the following would disrupt that chain of events?

- A. An intervening cause
- B. A superceding cause
- C. An act of nature
- D. All of the above \*

14. When two or more defendants could have caused the plaintiff's injuries, but only one could be responsible, and the court is unable to determine which of the two defendants is responsible, how does the court rule?

- A. The court will find that neither defendant is liable
- B. The court will find that both defendants are liable \*
- C. The court will find whichever defendant liable that the plaintiff desires
- D. None of the above

15. Had it not been for the defendant's negligence, the plaintiff would not have been injured. This statement most closely resembles which of the following tests for proximate cause?

- A. The substantial factor test
- B. The "but for" test \*
- C. The superseding cause test
- D. None of the above

16. The defendant was the predominant factor in the plaintiff's injuries. This statement most closely resembles which of the following tests for proximate cause?

- A. The substantial factor test \*
- B. The "but for" test
- C. The superseding cause test
- D. None of the above



17. The Restatement position on proximate cause is most closely associated with which to the following statements?

- A. That the defendant is responsible for the plaintiff's injuries when he is the legal cause of those injuries \*
- B. That the defendant is responsible for the plaintiff's injuries only when his negligent actions are closest in time to those injuries
- C. The defendant is responsible for the plaintiff's injuries only when it can be shown that the defendant acted with reckless disregard for the safety of others
- D. None of the above

18. When the defendant's actions are considered to be too remote in time between his actions and the plaintiff's injuries, what is the likely result at trial?

- A. The plaintiff will be unable to prove causation and therefore the defendant will not be liable \*
- B. The plaintiff will be able to prove causation and the defendant will be held liable a trial
- C. Such a finding would have no impact on the case
- D. All the above

19. The analysis of proximity cause takes into account not only the facts of the particular case, but also:

- A. An assessment of the responsibility for those actions \*
- B. An assessment of the plaintiff's obligation to the defendant
- C. An assessment of the applicable criminal statutes
- D. None of the above

20. When the court rules that the defendant's actions and the resulting plaintiff injuries are separated by too much time, the court will often apply this term:

- A. Jurisdiction
- B. Remoteness \*
- C. Legal cause
- D. None of the above

21. In the famous Palsgraf case, the court created a doctrine that stated:

- A. The defendant can only be liable to a plaintiff to whom he had a contractual relationship
- B. The defendant can only be liable to a plaintiff with whom he had a special relationship
- C. The defendant can only be liable to a plaintiff whom he knew personally
- D. A defendant could only be liable to a plaintiff to whom his negative actions could foreseeably cause injury \*

22. Since the holding in the Palsgraf case, courts have consistently used this term as part of its determination of proximate cause

- A. Identity
- B. Foreseeability \*
- C. Contractual relationship
- D. None of the above

23. The extent to which the defendant should have been able to determine that his negligent actions could result in injury to another.

- A. Illegal cause
- B. Jurisdiction
- C. Anticipatory breach
- D. Foreseeability \*

24. One of the most influential and important cases in American jurisprudence that explores the issue of proximate cause

- A. Roe v. Wade
- B. Palsgraf v. Long Island Railroad Co. \*
- C. Pointer v. National Railway
- D. Simms v. Long Island Railroad Co.

25. In a jury trial, \_\_\_\_\_ determines the facts, while \_\_\_\_\_ determines the law.

- A. The jury, the judge
- B. The plaintiff, the jury
- C. The judge, the defendant
- D. The judge, the appellate court

### True-False (10)

1. The defendant whose negligent act was closest in time to the plaintiff's injuries will always be liable under proximate cause. (F)

2. Proximate cause involves not only a factual determination but also public policy concerns. (T)
3. Under the substantial factor test, the plaintiff must be a substantial factor in creating his own injuries. (F)
4. Under the "but for" test, the court determines that had it not been for the defendant's actions, the plaintiff would not have been injured. (T)
5. There is only one type of proximate cause test that they can be used in all types of cases. (F)
6. Public policy has a big impact on proximate cause analysis. (T)
7. By limiting the scope of the defendant's responsibility under proximate cause, courts may also limit the possibility of the plaintiff's recovery. (T)
8. Proximate cause means that the defendant who was negligent closest in time to the plaintiff's injuries will always be liable. (F)
9. When dealing with a remote cause, it is more likely that the defendant's negligence was superseded by some other action. (T)
10. Under approximate cost analysis, the defendant is responsible for all consequences stemming from his negligence, no matter how remote in time (F)

## Chapter 8. Negligence: Damages

### Lecture Outline

*Outline discussion:* This chapter details the types of damages available to a plaintiff, including compensatory damages and punitive damages. Students should be able to describe how damages are assessed and the difference between general compensatory damages and special compensatory damages.

### Chapter Outline:

- I. Damages in the Chumley case
  - A. Damages
  - B. Summary of Medical Injuries and diagnoses
- II. Introduction to damages
  - A. Compensatory damages
    - 1. General damages
      - a) Pain and suffering
        - i. *-Presenting an argument to the jury for pain and suffering and other general damages*
    - 2. Special Damages
      - a) Lost wages
      - b) Medical bills
      - c) Future Losses
        - i. Measuring future lost income
    - 3. Proving Damages
      - a) Why is the distinction between general and special damages important?
      - b) "Day in the life" video
      - c) Proving Property Losses
      - d) Collateral Source Rule
      - e) Mitigation of Damages
    - 4. Emotional distress
    - 5. Loss of consortium
    - 6. Prior injuries
    - 7. Bad faith damages
  - B. Punitive Damages
    - 1. Case Excerpt: *Rufo v. Simpson*, 103 Cal.Rptr.2d 492 (2001)
    - 2. Tort reform and punitive damages
    - 3. Tobacco Companies and Punitive Damages
  - C. Nominal Damages



### III. Evaluating a case for potential Damages

- A. Evaluating a case
  - B. Reviewing the facts of a case
  - C. Asset searches
  - D. Jury's function is assessing damages
    - 1. Jury Instructions
- Skills You Need in the Real World: Keeping Track of Medial Records
  - The Life of a Paralegal: Celeste Jenks
  - Chapter Summary
  - Ethical Issues for the Paralegal: National Paralegal Associations
  - Web Sites
  - Forms and Court Documents: Complaint emphasizing loss of consortium claim

### Additional Web Resources

- Understanding Mass Personal Injury Litigation  
<http://www.rand.org/publications/RB/RB9021/RB9021.word.html>
- Personal Injury Law Nolo.com  
<http://www.nolo.com/lawcenter/ency/index.cfm/catID/73BB194F-C331-4C03-82E96DC64062980C>
- Find law.com  
[http://public.findlaw.com/states\\_new.html](http://public.findlaw.com/states_new.html)

### Additional Assignments

1. Have students locate examples of recent legislative initiatives to limit punitive or other damage.
2. Have students locate recent cases from the local courthouse in which punitive damages are alleged. What facts in the case support/do not support the award?
3. Have students locate examples of complaints that feature request for the specific types of damages discussed in the text.

### Answers to Review Questions

1. What are the three categories of damages?

The three categories of damages are: 1) Compensatory damages, 2) Punitive damages and 3) Nominal damages

2. What are nominal damages?

A nominal damage is the jury's award of a small amount of money to the plaintiff. Generally, nominal damages are not seen in typical negligence cases since the plaintiff must prove loss as part of his case.

3. Explain loss of consortium claims.

This claim states that when the plaintiff was injured, the marital relations between the plaintiff and spouse were also injured. In all jurisdictions, the

spouse is entitled to file some form of loss of consortium claim. The spouse is entitled to damages for the loss of companionship, affection, sexual relations and other losses that frequently occur when one spouse has been injured.

4. Why do courts make a distinction between general and special damages?

General damages consist of intangible claims, such as pain and suffering and are often difficult to quantify. Juries are sometimes swayed by emotion and award enormous sums for general damages, making them a hot topic for appeal. On the other hand, special damages are usually linked to easily-provable items such as medical bills. As such, they usually do not receive as much scrutiny on appeal.

5. Explain prior existing injuries

If the plaintiff has been injured prior to the incident caused by the defendant's negligence his ultimate award may be reduced or eliminated if the jury believes that the plaintiff's injury is actually a result of that prior occurrence and not the result of the defendant's negligent action.

6. Explain fair market value

This is the amount that a willing buyer would pay for an item that a willing seller would be willing to accept; it is often used to determine the value of items.

7. Describe how the plaintiff would go about proving property loss

The plaintiff could present testimony concerning the damage to the property, expert testimony about what it would cost to replace or repair the property and the efforts that the plaintiff has made to repair and/or replace the item.

8. What is the "collateral source rule" and what significance does it have for the plaintiff?

When a jurisdiction has a collateral source rule in place, it means that the jury can be told that the plaintiff has already been compensated for part of his loss through insurance or other benefits.

9. Why is a plaintiff required to mitigate his damages, when possible?

A plaintiff is obligated to mitigate or lessen his damages whenever reasonably possible. If he fails to do so, he cannot seek damages from the defendant that directly relate to his unreasonable actions. The simple reason for this rule is that it encourages plaintiffs to take reasonable action to lessen their damages.

10. Under what circumstances would a claim of bad faith be justified?

A judge would be authorized to assess bad faith damages against a party who had filed a frivolous claim, engaged in unethical tactics or been unreasonably antagonistic during the course of the litigation.

11. When and under what circumstances, is a plaintiff entitled to receive punitive damages?

Punitive damages awards are authorized in cases where the defendant has engaged in wanton, reckless or unreasonable conduct.

12. How has tort reform affected the award of punitive damages in many jurisdictions?

In many jurisdictions, statutes have been passed that expressly limit the award of punitive damages to a specific amount or a specific multiple of the compensatory damages. For instance, in a state that a treble damages limitation, the maximum amount of punitive damages that a plaintiff could receive would be three times the total amount of compensatory damages.

13. What are three important factors to consider when evaluating a case for damages?

Three important factors would include 1) the basic facts of the case, 2) the nature of the plaintiff's injuries and 3) the likelihood of recovery against the defendant.

14. Why would a plaintiff conduct an asset search of a defendant prior to bringing suit?

An asset search can reveal what type of financial resources the defendant has. If he has no insurance and no other financial resources, bringing suit against him will not result in an award of damages and may be considered a waste of time.

15. What is a verdict form? When is it used?

A verdict form is a form presented to the jury during its deliberations to help guide them in deciding the issues. It is often used in complex cases involving numerous allegations.

### **Answers to "Applying What You Have Learned"**

1. Larry's wife of 47 years died last year and was sent to a local crematorium for processing. After the body was purportedly cremated, Larry received a decorative jar that was supposed to contain his wife's ashes. Several months later, Larry saw news reports that the crematorium in question had been seized by the local authorities and dozens of corpses had been recovered that had been scheduled to be cremated, but had never actually been processed. Instead, the bodies were simply left outside or stacked in a shed. Larry decides to sue the crematorium. What kind of damages, if any, can Larry seek?

He can certainly seek any damages related to further procedures to have the remains interred. He could also seek damages for emotional distress brought about by the crematorium's actions.



2. Linda is involved in a car collision. The driver of the other car ran a red light and struck Linda's car on the driver's side. Linda was severely bruised. She was taken to the hospital and discharged the next day. Her hospital bill was \$2,456. Because she was in terrible pain, she lost almost 8 days from work. When she returned, she found that she had trouble concentrating. She kept reliving the collision in her mind. Her work suffered and her employer eventually fired her. She worked as advertising salesperson, which means that she spent most of her day driving from one client to another. Because of the accident, she suffers from terrible anxiety whenever she gets behind the wheel of a car. What type of damages can Linda seek against the other driver and how would you classify these damages: compensatory-general, compensatory- special, punitive or nominal?

She can recover special damages related to her lost wages, medical bills, etc. She could also recover for damages related to her inability to continue her profession.

3. Draft an Answer to the Complaint in "Forms and Documents." How should the defendant respond to the loss of consortium complaint?

Student responses will vary.

## **Test Bank**

### **Essay Questions (5)**

1. Explain the differences between compensatory damages and punitive damages.
2. Explain the difference between a loss of consortium claim and a pain and suffering claim.
3. Explain the difference between general compensatory damages and special compensatory damages. What are examples of each?
4. What types of information should you obtain from a client regarding his/her medical expenses?
5. Explain how the legal team would evaluate a case for potential damages.

### **Short Answer (10)**

1. What are nominal damages?
2. Provide examples of general compensatory damages.
3. Provide examples of special compensatory damages.
4. Explain why the classification of general damages verses special damages is so important and what impact it has on appeal.
5. Why do legal commentators say that testimony about general damages is often subjective in nature?
6. Why is an asset search important for case evaluation?



7. Explain how the jury awards damages in a case.
8. Explain the function of jury instructions.
9. What are nominal damages?
10. Explain the role of tort reform and punitive damages.

### Multiple Choice (25)

1. A claim that can be brought by the spouse of an injured plaintiff:
  - A. Special damages claim
  - B. Loss of consortium claim \*
  - C. General damages claim
  - D. None of the above
2. Medical bills would be categorized as what type of damages?
  - A. Punitive damages
  - B. General damages
  - C. Special damages \*
  - D. None of the above
3. One way of proving the long-term financial impact of the plaintiff's injuries is:
  - A. By having the plaintiff testify about what he thinks he would have made in the next few years
  - B. By presenting testimony from the plaintiff's friends about what a good worker the plaintiff is
  - C. By presenting testimony from an expert testimony about an economic analysis of the plaintiff's potential salary \*
  - D. All of the above
4. The term "damages" can refer to which of the following?
  - A. Financial losses
  - B. Medical bills
  - C. Damage to property
  - D. All of the above \*

5. The payment of a set fee for damage to a specific part of the plaintiff's body is an ancient concept. It was revived in what area of law?

- A. Criminal law
- B. Contract law
- C. Workmen's compensation law \*
- D. None of the above

6. Which of the following is not a category of damages?

- A. Nominal damages
- B. Compensatory damages
- C. Retribution damages \*
- D. Punitive damages

7. A sum of money awarded to the plaintiff to compensate him for his injury.

- A. Punishment
- B. Damages \*
- C. Restitution
- D. None of the above

8. The type of damages designed to make the plaintiff whole.

- A. Punitive damages
- B. Nominal damages
- C. Compensatory damages \*
- D. None of the above

9. Categorize the following damages: the monetary loss suffered by the plaintiff from not being able to work.

- A. Punitive damages
- B. General damages
- C. Special damages \*
- D. None of the above

10. As part of the jury award, the defendant was ordered to pay \$100,000 for the plaintiff's medical and financial losses, and \$1 million dollars because of the defendant's bad faith and reckless conduct. How would you categorize the \$1 million award?

- A. Punitive damages \*
- B. Compensatory damages
- C. Nominal damages
- D. None of the above

11. These damages of most closely associated with the defendant's negligent act.

- A. Special damages
- B. General damages \*
- C. Nominal damages
- D. All of the above

12. That category of damages that is most closely associated with the plaintiff's injuries and losses.

- A. General damages
- B. Special damages \*
- C. Nominal damages
- D. None of the above

13. Pain and suffering are considered what form of damages?

- A. General damages \*
- B. Special damages
- C. Punitive damages
- D. Nominal damages

14. A plaintiff's attorney might use an argument to justify an award for the plaintiff based on a dollar amount for the plaintiff's pain and discomfort for each day of his remaining years. This is an example of what argument?

- A. The collateral source argument
- B. The one day at a time argument
- C. The per diem argument
- D. The master-servant argument

15. When a plaintiff raises a claim concerning lost wages, he can prove his claim by:

- A. Presenting pay stubs
- B. Presenting affidavits and/or sworn testimony of employers
- C. Presenting previous years' tax returns
- D. All of the above \*

16. The person on the plaintiff's legal team boosts usually responsible for gathering all the documents, records, and other evidence to substantiate the plaintiff's damages.

- A. Office manager
- B. Paralegal \*
- C. Law clerk
- D. Senior partner

17. A plaintiff is not entitled to recover for:

- A. Pain and suffering
- B. Financial losses
- C. Prior injuries \*
- D. Future damages

18. Proof of the plaintiff's lost future income could include:

- A. The plaintiff's job duties and chances of promotion
- B. The plaintiff's educational background
- C. The market for the plaintiff's services
- D. All of the above \*



19. What is the standard of proof that the plaintiff must meet in order to prove his damages at trial?

- A. The same standard of proof that the plaintiff had when proving the other three elements of this negligence action \*
- B. Beyond a reasonable doubt
- C. To a mathematical certainty
- D. Beyond a shadow of a doubt

20. Which of the following damages are considered objective in nature?

- A. Punitive damages
- B. Pain and suffering damages
- C. Special damages \*
- D. All of the above

21. Many states have enacted tort reform statutes that seek to limit the award of damages in civil injuries cases. Most of these reforms are aimed at what type of damages?

- A. Compensatory
- B. Punitive \*
- C. Nominal
- D. Special damages

22. When a jury awards punitive damages:

- A. They are awarded in the place of compensatory damages
- B. They are awarded in addition to the compensatory damages \*
- C. They are awarded only when nominal damages are also assessed
- D. None of the above

23. These damages usually involve a party's conduct during the litigation.

- A. Nominal
- B. Punitive
- C. Discretionary
- D. Bad faith \*

24. When a plaintiff has a prior injury, what effect might this have on an award for a new injury sustained to the same area of his body?

- A. It will bar any possible recovery
- B. It may reduce his possible recovery in the new case
- C. It will not affect his recovery in the new case
- D. None of the above

25. The responsibility of the plaintiff to lessen his potential injuries or losses by taking reasonable actions to seek medical treatment or take other precautions when a reasonable person in the same situation would have done so.

- A. Retribution
- B. Subrogation
- C. Alleviation
- D. Mitigation \*

### True-False (10)

- 1. A plaintiff is only entitled to recover his medical damages. (F)
- 2. "Pain and suffering" damages are an example of special damages. (F)  
The purpose of compensatory damages is to punish the defendant. (F)
- 3. The main purpose of awarding damages to the plaintiff is to make him whole. (T)
- 4. Punitive damages are designed to punish the defendant and send a message to the committee that such conduct will not be tolerated in the future. (T)
- 5. In situations where it is impossible to return to the plaintiff to his original condition, punitive damages are designed to get him as close to his original condition as possible. (F)
- 6. The plaintiff is not entitled to receive damages for psychological injuries. (F)
- 7. General damages are usually a harder for the plaintiff to quantify. (T)
- 8. The jury has a specific formula that it must follow when determining general damages. (F)
- 9. A plaintiff cannot recover for future damages. (F)
- 10. The plaintiff is not in entitled to recover for lost time for his leisure activities. (T)



## Chapter 9

### Defenses to Negligence

#### Lecture Outline

*Outline discussion:* Different states follow vastly different rules in regard to defenses permitted in negligence actions. This chapter will explain the important distinctions between the few states that still follow the contributory negligence doctrine, and the majority of states that follow some variation of comparative negligence.

#### Chapter Outline:

- I. The Railroad's Defense in the Chumley Case
- II. Introduction to Contributory Negligence
  - A. Historical reasons for the development of contributory negligence
  - B. Defining Contributory Negligence
3. Why Study Contributory Negligence?
4. Why Does the Doctrine Continue to Exist?
  - C. The Doctrine of "Avoidable Consequences"
  - D. How Much At Fault Must Plaintiff Be?
  - E. Is There Such a Thing as "Contributory Negligence *Per Se*?"
  - F. The "All or Nothing" element of contributory negligence
  - G. Is Contributory Negligence Doomed?
  - H. Exceptions to Contributory Negligence
3. Last Clear Chance
  - a) Proving Last Clear Chance
  - b) Pleading Last Clear Chance
4. Other Exceptions to Contributory Negligence: Sudden Emergency
5. Other Exceptions to Contributory Negligence: Assumption of the Risk
6. Other Exceptions to Contributory Negligence: Plaintiff's Age and Physical Factors
  - a) Mental Incompetence
7. Other Exceptions to Contributory Negligence: The Rescuer Doctrine
  - I. Situations Where Contributory Negligence Does Not Apply
  - J. Contributory Negligence is a Jury Question
3. Jury Instructions on Contributory Negligence
- III. Comparative Negligence
  - A. Historical Development of Comparative Negligence
  - B. The Uniform Comparative Fault Act
  - C. The Three Models of Comparative Negligence
3. "Pure" Comparative Negligence
4. Modified Comparative Negligence
5. Slight-Gross Comparative Negligence
6. Combinations of Approaches
  - D. Types of Cases Where Comparative Negligence Applies
  - E. Comparative Negligence and Punitive Damages
  - F. How comparative negligence affects proximate cause analysis



- G. Defenses to Comparative Negligence
- 3. The Rescuer Doctrine
- 4. Mentally Incompetent Persons
  - H. Pleading Comparative Negligence
  - I. Settlement Issues in Comparative Negligence Cases
  - J. Multiple Defendants and Comparative Negligence
  - K. Motions for Directed Verdict in Comparative Negligence Cases
  - L. The Jury's Verdict
- IV. Case Excerpt: Contributory Negligence
- V. Case Excerpt: Comparative Negligence
  - Skills You Need in the Real World: Preparing a Trial Notebook
  - Life of a Paralegal: Elizabeth Adams
  - Chapter Summary
  - Ethical Issues for the Paralegal: Paralegals who can appear in court
  - Web Sites
  - Forms and Court Documents: Excerpt from Defendant's Answer in a Contributory Negligence Jurisdiction

### **Additional Web Resources**

- ❑ Lexis-Nexis.com  
<http://www.lexisnexis.com/>
- ❑ U.S. First Circuit Opinions  
<http://www.law.emory.edu/1circuit/>
- ❑ Expert Witness Database  
<http://www.freereferral.com/>

### **Additional Assignments**

1. Log onto various on line legal search databases and locate articles about contributory negligence.
2. Use the above to locate exactly which states still follow contributory negligence.
3. Find articles using the above that support the continued use of contributory negligence.

### **Answers to Review Questions**

1. Most of the states that have adopted "pure" comparative negligence did it through judicial action; most of the states that enacted comparative negligence through legislation opted for a more limited form of comparative negligence. What is the reason for this discrepancy?

Courts do not face the same pressures from voters that members of the Legislature do. Therefore, they are freer to adopt the more controversial

“pure” comparative negligence, while legislatures are more inclined to adopt a modified form.

2. Why would such a harsh concept as contributory negligence ever be developed in the first place?

There are several reasons: 1) such a theory was in line with judicial temperament at the time that it was enacted; 2) it favored early business efforts and insulated corporations from lawsuits; 3) it was more in holding with other similar legal theories that were prevalent at the time; 4) it was a means to control what many saw as ill-educated jurors who might award large judgments simply out of their dislike of big business.

3. It is said that comparative negligence developed as a reaction to contributory negligence. In what way?

The harsh results of contributory negligence were certainly a spur to those seeking some alternative. Comparative negligence, that is certainly a more fair balancing of the interests of the plaintiff and the defendant, fit the bill.

4. How is comparative negligence an improvement over contributory negligence? Is it an improvement?

Many argue that comparative negligence is a substantial improvement over the “all or nothing” rule found in contributory negligence. In comparative negligence, the plaintiff’s own negligence is balanced against that of the defendant; it does not act as a complete bar to recovery.

5. In recent years, there have been claims of runaway juries and huge awards in personal injury cases purportedly made by plaintiffs with marginal cases. Does this situation call for the reinstitution of contributory negligence? Why or why not?

First of all, the statistics concerning these ‘runaway’ juries are ambiguous; secondly, no jurisdiction that has enacted comparative negligence has given any indication of changing back to what many see as an outmoded and unjust legal doctrine.

6. What are the three elements of a contributory negligence claim that a defendant must prove?

The defendant must prove that the plaintiff knew of the danger he was in, that he failed to exercise ordinary care to protect himself and that his failure to exercise such care contributed, in some way, to his own injuries.

7. Explain the difference between the various types of comparative negligence.

Under “pure” comparative negligence schemes, a plaintiff is entitled to receive an award of damages no matter how great his fault, assuming that the defendant is also found to be at fault. Under the modified comparative negligence rules, a plaintiff’s recovery could be limited in at least two ways. In some jurisdictions, a plaintiff’s negligence must be less than 50%. In those states, like Georgia, if the plaintiff’s negligence is greater than 50%, or greater than the defendant’s negligence, he will receive no recovery, mirroring the

result in a contributory negligence jurisdiction. In other states that follow a form of “modified” comparative negligence, the plaintiff’s negligence can be equal to the defendant’s negligence. In those states, the plaintiff’s recovery will be reduced by the amount of his percentage of fault. Under the “slight-gross” comparative negligence scheme, a plaintiff is entitled to recover if his negligence is slight and the defendant’s negligence is great.

8. Explain the Last Clear Chance doctrine. When does it apply? When is this defense not available in a negligence action?

Under the last clear chance doctrine, a plaintiff’s contributory negligence will be excused if the defendant has the last opportunity of avoiding the accident and fails to do so. It applies in jurisdictions that follow the contributory negligence doctrine.

9. What is a “sudden emergency,” and what effect does it have on a contributory negligence case?

Under this doctrine, when a plaintiff is confronted with a sudden emergency, something that requires a quick response, he will not be held to the same standard as would a plaintiff who had more time to consider his actions.

10. Why is contributory negligence not a defense to intentional torts?

Intentional torts involve intentional, not negligent actions. Contributory negligence is restricted to situations involving claims of negligence.

11. How is “pure” comparative negligence different from “modified” comparative negligence?

Under “pure” comparative negligence, the plaintiff’s percentage of fault may be to any degree less than 100% and he can still recover. Under most schemes of modified comparative negligence, the plaintiff can only recover when his negligence is either less than 50% or less than the defendant’s percentage of negligence.

12. Some commentators have suggested that comparative negligence is inconsistent with traditional proximate cause analysis. Draft an argument in support of this argument.

One argument could be that since comparative negligence takes into account the plaintiff’s own actions in causing injury to himself they disrupt the defendant’s proximate cause and supplant the defendant’s responsibility with that of the plaintiff.

## **Answers to “Applying What You Have Learned”**

1. Joe is driving his motorcycle in a state where helmet use is required by statute. Joe is not wearing his helmet because it presses down his hair and he thinks he looks sexy without it on his head. As Joe is driving down the highway, Amanda is in a car that pulls out directly in front of Joe. Joe runs into Amanda’s car and



receives severe head injuries. Joe sues Amanda in a state that follows the "Georgia plan" on comparative negligence. You are on the jury in Joe's case. What is your verdict?

The jury might find that Joe's negligence exceed that of Amanda and under the Georgia plan, Joe would not be entitled to any recovery.

2. If Mr. Chumley's case is filed in a state that still follows contributory negligence, is he likely to lose? Why or why not?

The problem in the Chumley case is that there is no evidence that Mr. Chumley stopped (as he was required to do) at the intersection before proceeding across. That is both good and bad. On the one hand, since there is no evidence to show that he was contributorily negligent, he may still have a good chance of winning. However, if the defense can produce any evidence that Mr. Chumley failed to stop, they would have a solid contributory negligence defense.

3. John is visiting a traveling carnival and buys a ticket for a Ferris wheel ride. The back of the ticket has language that states, "Ferris wheels are a dangerous form of entertainment. The purchaser assumes all dangers in the operation and function of the Ferris wheel and waives any claims against the Carnival Company for any negligence that might occur in the operation of said Ferris wheel or for any damages or injuries he may receive as a result of this ride." While John is sitting in one of the chairs, the operator wanders away from his post and never sees that several bolts on the wheel have come loose. John's chair falls and he is injured. Can he sue the Carnival Company? If your answer is yes, what defenses are available to the Carnival Company. Does your answer change if the entire incident occurred in a contributory negligence state?

This question raises the question of whether John waived his right to sue by purchasing the ticket. Since most jurisdictions hold that it is a violation of public policy for a company to seek to waive its negligence, the court will probably conclude, for public policy reasons, that the purported waiver on the back of the ticket is unenforceable. The Carnival Company has very few defenses available to it. The answer to this question does not change if the case occurs in a contributory negligence state since there has been no showing that John was negligent.

4. It's the annual office picnic and Steve has arrived late. He is supposed to be running one of the large grills and since he is late, he rushes to the grill, spills in an immense amount of lighter fluid (thinking that it will get the grill hot in a short period of time). He doesn't realize that the can of lighter fluid is defective and when he lights the grill, fire shoots from the grill and catches John's clothing on fire, causing severe burns. Draft a complaint, based on these facts and then an Answer using contributory negligence as a defense. What key points must you raise in your Answer?

The students' response to this question will vary with their ability to draft a complaint, but there are certain points that should appear in their pleadings:



1) Whom do we sue? If the student sues the manufacturer of the lighter fluid, then the company would appear to have a solid contributory negligence defense. 2) Surely the company should have anticipated such an action as John's and designed for such use. 3) Does the fact that the can of lighter fluid is defective circumvent any possible claims of contributory negligence?

5. John was injured in a car wreck with another car driven by Martha. At the end of the trial, the jury determines that John and Martha are both 50% at fault in the accident. This states follows the "New Hampshire" rule. What is the result in this case?

Under the "New Hampshire" plan, a plaintiff can recover if he is 50% negligent or less. If he is more than 50% negligent, he is barred from recovery, echoing the provisions of contributory negligence. Under this plan, John would still be able to recover, but his recovery would be reduced by half.

6. Using the same facts as the previous question, evaluate the case under the "Georgia" rule. Is the result in the case different? If so, how?

Under the "Georgia plan," a plaintiff must be less than 50% negligent before he can recover. Under this plan, John would not be entitled to any recovery.

## **Test Bank**

### **Essay Questions (5)**

1. Explain the difference between comparative negligence and contributory negligence.
2. Explain the various types or approaches to comparative negligence used throughout the United States.
3. Is contributory negligence a pro-business doctrine? Why or why not?
4. List and explain some of the exceptions to the contributory negligence defense.
5. Explain how you would prepare a trial notebook.

### **Short Answer (10)**

1. Give one argument in support of and one argument against the defense of contributory negligence.
2. Describe the historical development of contributory negligence.
3. Explain contributory negligence.
4. There are at least three different versions of comparative negligence, explain each.
5. Explain the last clear chance doctrine.
6. The adoption of contributory negligence in United States occurred at approximately the same time as the Industrial Revolution. Is there any linkage between the two? Why or why not?

7. Why is the study of contributory negligence helpful, even in states that follow a comparative negligence approach?
8. What are some reasons why states would continue to follow the contributory negligence doctrine?
9. Explain how fault is apportioned among multiple defendants.
10. What is the Rescuer Doctrine?

### Multiple Choice (25)

1. The rule that dictates that when a plaintiff is at fault he will receive nothing in his/her negligence claim.

- A. Comparative negligence
- B. Contributory negligence \*
- C. Proximate cost
- D. The Tennessee Rule

2. The doctrine that holds that if the defendant had the final opportunity of avoiding harm to the plaintiff and did not do so, contributory negligence will not be a factor in the case.

- A. The ultimate sanction rule
- B. The avoidance rule
- C. The last clear chance doctrine \*
- D. The hearsay doctrine

3. The pleading in which a contributory negligence defense would be raised.

- A. The complaint
- B. The answer \*
- C. The verdict
- D. The appeal

4. Under this system, the plaintiff's negligence, if any, is factored into the analysis of the defendant's fault, and the overall plaintiff's recovery is reduced by the percentage of his fault.

- A. Comparative negligence \*
- B. Contributory negligence
- C. Last clear chance
- D. None of the above

5. It has been called one of the harshest doctrines in law.

- A. Comparative negligence
- B. Contributory negligence \*
- C. The Rescuers doctrine
- D. None of the above

6. One argument in support of contributory negligence is:

- A. That when the plaintiff has contributed to his own injuries, it affects the analysis of proximate cause and effectively removes the defendant as the cause of the plaintiff's injuries \*
- B. That it allows a more humane approach to negligence law
- C. That it provides more opportunities for the plaintiff
- D. None of the above

7. Historically, contributory negligence was seen as a means:

- A. As a means to allow plaintiffs greater access to the court system
- B. As a means to allow plaintiffs the possibility of larger rewards
- C. To assist the Industrial Revolution and limit the award of damages against major corporations \*
- D. None of the above

8. According to this view, the plaintiff's failure to take reasonable precautions to protect his own safety merges with the defendant's negligence in causing the injury. This view is taken by:

- A. The Georgia Rule on Contributory Negligence
- B. The New Hampshire Rule on Contributory Negligence
- C. The Tennessee Rule on Contributory Negligence
- D. The Restatement Rule on Contributory Negligence \*

9. Mitigation of damages most closely resembles which court doctrine

- A. The doctrine of contributory negligence
- B. The last clear chance doctrine
- C. The doctrine of avoidable consequences \*
- D. None of the above

10. Some commentators have suggested that a better name for contributory negligence would be:

- A. Contributory fault \*
- B. Contributory duty
- C. Superceding duty
- D. None of the above

11. \_\_\_\_\_ is a complete bar to the plaintiff's recovery, while \_\_\_\_\_ will lessen the plaintiff's ultimate award.

- A. Comparative negligence, last clear chance
- B. Contributory negligence, rescuer doctrine
- C. Contributory negligence, comparative negligence\*
- D. The Tennessee rule, the Georgia rule

12. Under this doctrine, the plaintiff's actions after his injury, for instance, his failure to seek proper medical care, can result in a reduction in his total award.

- A. Contributory negligence
- B. Comparative negligence
- C. Avoidable consequences doctrine \*
- D. Last clear chance doctrine

13. Under the basic scheme of contributory negligence, if a plaintiff is even 1 percent at fault and the defendant is 99% at fault:

- A. He will be found to be contributorily negligent and will not receive any jury award \*
- B. The plaintiff's award will be reduced by the percentage of his negligence
- C. The plaintiff will split his award with the defendant
- D. None of the above

14. In some states, contributory negligence theory has been modified to the extent that the defendant must prove that:

- A. The plaintiff's negligence was more than a slight amount \*
- B. That the plaintiff's negligence exceeded the defendant's negligence
- C. That the plaintiff's negligence was greater than 50 percent
- D. None of the above



15. When a plaintiff is violating a safety statute at the time that he is injured:
- A. Most jurisdictions would find him liable under the theory of contributory negligence per se
  - B. The plaintiff would be barred from any recovery in both comparative negligence jurisdictions and contributory negligence jurisdictions
  - C. In most jurisdictions, this violation of the safety statute is one more factor to determine whether the plaintiff contributed to his own injuries \*
  - D. All of the above
16. How is proximate cause analysis affected by the plaintiff's contributory negligence?
- A. Proximate cause is not involved in any analysis of the plaintiff's negligence
  - B. The plaintiff must be the proximate cause of his own injuries in order to be found liable under contributory negligence \*
  - C. Proximate cause analysis dictates that the plaintiff's negligence must exceed the defendant's own negligence before the plaintiff can be found contributorily negligent
  - D. None of the above
17. In some jurisdictions, when the defendant is found to have violated a safety statute when he injures the plaintiff:
- A. The defendant will be allowed to use contributory negligence as a way of reducing his overall liability
  - B. The defendant may be barred from using contributory negligence as a defense \*
  - C. The defendant can win by a motion for directed verdict
  - D. None of the above
18. One of the biggest criticisms of the contributory negligence rule is that:
- A. It is essentially an "all or nothing" lottery
  - B. It fails to take into account the other factors that might contribute to the plaintiff's injuries
  - C. It fails to reflect the more modern trends in legal analysis
  - D. All of the above \*
19. Why have some jurisdictions continued to follow contributory negligence?
- A. The jurisdiction may simply have a more conservative approach to law
  - B. The jurisdiction's court system may be reluctant to adopt what is considered to be a radical change in civil injuries law
  - C. Legislators in these jurisdictions do not care about injured victims
  - D. A and B, but not C \*

20. Under the last clear chance doctrine, if the defendant had the last opportunity to avoid injuries to the plaintiff:

- A. The defendant will be liable for punitive damages
- B. The defendant will not be liable to the plaintiff
- C. The defendant will not be able to use the defense of contributory negligence \*
- D. The plaintiff can be held liable to the defendant

21. The last clear chance doctrine is also known as a:

- A. The doctrine of available consequences
- B. The doctrine of mitigation of damages
- C. The doctrine of plaintiff's liability
- D. The doctrine of discovered peril \*

22. In the states that have adopted comparative negligence, the doctrine of last clear chance:

- A. Is embodied in the rescuer defense
- B. Is the last vestige of contributory negligence
- C. Has usually been abolished \*
- D. None of the above

23. Who has the burden of proving last clear chance?

- A. The plaintiff \*
- B. The defendant
- C. The plaintiff, but only in comparative negligence jurisdictions
- D. The defendant, but only in comparative negligence jurisdictions

24. Under this doctrine, which is an exception to the rule of contributory negligence, a plaintiff to this confronted with an immediate threat is not required to exercise the same standard of care as someone who is not.

- A. The explosion doctrine
- B. The last clear chance doctrine
- C. The deadly weapon doctrine
- D. The sudden emergency doctrine \*

25. Which of the following is an exception to the contributory negligence rule?

- A. The sudden emergency doctrine
- B. Assumption of the risk
- C. Last clear chance doctrine
- D. All of the above \*

### True-False (10)

1. The vast majority of states in the United States follow the contributory negligence doctrine. (F)
2. Under comparative negligence, if the plaintiff is at fault to any degree, he will be barred from any recovery. (F)
3. The outcome for a plaintiff in a negligence case will not be affected significantly whether the case is brought in a comparative negligence state or a contributory negligence state. (F)
4. The doctrine of contributory negligence was once followed in almost all jurisdictions. (T)
5. In the last few decades, many states have modified their statutes or court rules to create comparative negligence schemes. (T)
6. Most other countries that have legal system similar to the United States have abandoned contributory negligence. (T)
7. According to some commentators, under contributory negligence, a plaintiff has a standard of care imposed on his own actions, at the same time that the defendant has a standard of care imposed on his. (T)
8. In a negligence action, the defendant can choose between comparative negligence or contributory negligence defenses. (F)
9. The doctrine of avoidable consequences is identical to contributory negligence. (F)
10. When a plaintiff is confronted with a sudden emergency, he is held to the same standard of care as at any other time. (F)

## Chapter 10

### Products Liability & Strict Liability

#### Lecture Outline

*Outline discussion:* here we begin to explore some of the more noteworthy and often highly publicized cases involving a wide range of products. Students are introduced to the somewhat stormy history of products liability litigation and the more recent philosophical changes in court decisions that have resulted in more wide-ranging lawsuits under a wide variety of legal theories.

#### Chapter Outline:

- I. Introduction
- II. A Products Liability Case: Tire Blow Out
- III. Strict Liability
  - A. Ultra-hazardous Activity
  - B. A short history of strict liability
    - 1. Developing Strict Liability in the U.S.
  - C. Strict Liability for Animal Behavior
  - D. Strict Liability Has Not Been Adopted in All Jurisdictions
  - E. Statute of limitations concerns in strict liability lawsuits
- IV. Introduction to Products Liability
  - A. Products Liability in the United States
    - 1. Privity of Contract Requirement
      - 2. The Theory Underlying the Privity Requirement
  - B. A new judicial approach
    - 1. The *MacPherson* Case and a Change in Judicial Attitudes
      - a. *Case Excerpt -- MacPherson v. Buick Motor Co.*
      - b. The Significance of the *MacPherson* Case
  - C. The Basic Elements of a Products Liability Case
  - D. Products Liability Cases Do Not Involve Consumer Dissatisfaction
    - 1. Different Approaches to Products Liability
  - E. Warranties
    - 1. Warranty of Merchantability
    - 2. Warranty for Fitness for Purpose
    - 3. Express Warranties
  - F. Liability Without Fault Under Products Liability
  - G. The Standard of Care in Products Liability Cases
    - 1. Manufacturer's Duty to Test and Inspect Products
      - a. Food
      - b. Compliance with safety and/or health regulations



- H. Products Liability Per Se?
- I. Public Policy Arguments For Products Liability Cases
- J. Proving a Products Liability case
  - 1. Design Defects
  - 2. Manufacturing Defects
  - 3. Defects in marketing
  - 4. Pleading Products Liability Cases
- K. Model Uniform Products Liability Act
- L. Discovery in Products Liability Cases
- M. Case Excerpt – The First World Trade Center Attack
- N. Retailers and “Mere Conduits”
- O. Inherently Dangerous Objects
- P. Defenses to Products Liability Actions
- V. The Tire Blow Out Hypothetical:
  - Skills You Need in the Real World: Maintaining the Chain of Custody for Evidence
  - Life of a Paralegal: Renae Elam
  - Chapter Summary
  - Ethical Issues for the Paralegal: Frivolous Law Suits
  - Web Sites
  - Forms and Court Documents: Product Liability Complaint

### **Additional Web Resources**

- ❑ Law Crawler  
<http://lawcrawler.findlaw.com/>
- ❑ Internet Law Library  
<http://www.lawresearch.com/>
- ❑ Propulsid Product Liability Litigation  
<http://propulsid.laed.uscourts.gov/>

### **Additional Assignments**

1. Have your students use some of the more common, current cases such as the Firestone cases, to make arguments for and against product liability cases.

### **Answers to Review Questions**

1. What are the three theories of products liability lawsuits?  
The plaintiff is allowed to sue for breach of warranty, for breach of contract and for negligence.

2. How is a strict liability action different from a negligence action?

A negligence action focuses on the fault of the individuals involved. Under strict liability, fault is not a factor. A person who is not at fault may still be liable to an injured plaintiff.

3. How is a strict liability lawsuit different from an intentional tort?

Unlike intentional torts, there is usually no allegation in a strict liability suit that the defendant intentionally designed a defective product; in fact, the manufacturer can show not only that he did not intentionally design a fault product, but that he actually followed all safety procedures and yet he will still be liable.

4. Why does the law consider the defendant's care and correct procedures in a negligence case, but ignores in a strict liability lawsuit?

The answer to this question may vary, but should include at least some statement about the fact that strict liability suits involve products that are inherently dangerous and therefore justify a higher standard of care.

5. How would you define the term "abnormally dangerous activity?"

Abnormally dangerous activity would include any manufacturing or other process, or a product, that is essentially dangerous in its normal state. Such activities would include the manufacture of poisons, acids or explosives.

6. What is the significance of the *Rylands* case?

This case was one of the first cases to establish the principle of strict liability for abnormally dangerous situations and helped to further the entire body of strict liability law.

7. How have judicial rulings changed in strict liability cases from the mid-1800's through the 1900's?

Strict liability gradually came into its own as a legally-recognized doctrine between the opinion in the *Rylands* case and Carodozo's holding in *MacPherson*.

8. What are some of the alternative theories of recovery in products liability lawsuits?

One such alternative theory of recovery is for breach of warranty for a product. A warranty is a promise either express or implied made by the manufacturer when the product is created. Other theories of recovery would include faulty design/fault manufacture of the item in question.

9. How is the theory of strict liability different from that of negligence theory?

The biggest difference involves the allegation of fault. It is required under negligence theory, but is essentially irrelevant under strict liability.

10. Prior to the 1960's, if a person wished to sue a manufacturer of a defective or dangerous product, what types of recovery were available to him?  
Prior to this time period, a person could attempt to recover under general strict liability theory, contract theory or breach of warranty theory.
11. Explain the history of strict liability in the United States  
Strict liability has developed in fits and stages. With the adoption of the Rylands case, strict liability received a big push here, but it was quickly silenced by the *Winterbottom v. Wright* ruling. In the early 1900's, the MacPherson case gave strict liability law a new impetus.
12. What is the significance of the MacPherson case?  
The *MacPherson* case is significant because it signaled the beginning of the end of the pro-business court rulings in strict liability and products liability cases.
13. Why is it important to preserve evidence?  
Without the evidence, it is often impossible to prove the defective nature of the item in question.
14. What is the "chain of custody" for evidence?  
"Chain of custody" refers to all of the individuals who have touched or interacted with the evidence prior to its admission at trial. These people may have to testify in order to prove that the condition of the evidence was not brought about by their interference, but by the condition of the evidence itself.
15. What are examples of "inherently dangerous" objects?  
Handguns, explosives, wild animals, all qualify as inherently dangerous objects.
16. How is the law of product liability applied to retailers?  
When the plaintiff brings an action against a retailer, the plaintiff must show that the product was dangerous and that the retailer had reason to know that the product was dangerous.
17. Explain the ruling in the Case Excerpt.  
The MacPherson case stands for the proposition that the manufacturer of a defective product has a duty to inspect and to make safe before placing it into the stream of commerce.

### Answers to "Applying What You Have Learned"

1. Ajax Company has come up with a new toy. This toy is a rocket ship that when activated, flies through the room in a great sweeping circle, spewing out candy. The space ship is designed with sharp angles and points on the wings and nose. The first time it was used it struck Toby in the face. He has been severely



scarred. Does Toby have the products liability cause of action? If so, on what theories should he base his products liability lawsuit?

Toby's best bet is a product liability action based on faulty design. After all, the rocket ship does perform well; it's just dangerous when it is flying around the room.

2. Does it matter in our products liability case against the tire manufacturer that Susan did not keep the tire? Would the tire be helpful in the lawsuit? If so, how?

The tire may be the only evidence of the tread separation or manufacturing defect found in the tire and without it, Susan may not be able to prove her case.

3. ABC Computer Company has produced a new laptop computer that it says is "the most user-friendly computer in the world." Gene purchases the computer and the first time he powers it up he receives a severe electric shock. Draft a products liability complaint on these facts using breach of warranty and strict liability theories.

The students' responses will vary.

## Test Bank

### Essay Questions (5)

1. Explain the differences between product liability cases and strict liability cases.
2. Explain the impact of the *Rylands v. Fletcher* case.
3. What types of warranties figure prominently in product liability cases?
4. Explain the three theories upon which a product liability lawsuit can be based.
5. Explain the impact of the *MacPherson* case on product liability suits.

### Short Answer (10)

1. Give some examples of cases in which strict liability would apply.
2. What is meant by "ultra hazardous" activity?
3. Explain the extent of an owner's liability when he or she keeps dangerous animals.
4. What are some examples of abnormally dangerous activities?
5. How is strict liability different from traditional negligence claims?
6. What is a public policy argument for the creation of strict liability?
7. What are some examples of ultra hazardous activities?
8. What issues were involved in the *Rylands v. Fletcher* case?
9. What is the warranty of fitness for particular purpose?
10. What is the standard of care in products liability cases?



## Multiple Choice (25)

1. The requirement, now abolished in many jurisdictions, that the person injured by a defective product have a contractual relationship with the manufacturer.
  - A. Privity \*
  - B. Novation
  - C. Rescission
  - D. Partial performance
  
2. Which of the following is an example of a products liability lawsuit?
  - A. Manufacturing defects in automobile tires that cause them to blow out at high rates of speed
  - B. Breast implants that leak once they have been surgically placed
  - C. A design defect that causes carbon monoxide to leak into the interior of a certain model of car
  - D. All of the above are examples of a product liability lawsuits \*
  
3. The legal doctrine that holds that a person is liable for any damages resulting from inherently dangerous activities, no matter what safety precautions the person uses.
  - A. Contributory Negligence
  - B. Proximate Cause
  - C. Strict Liability \*
  - D. Remote Liability
  
4. Liability without regard to fault
  - A. Negligence
  - B. Intentional tort
  - C. Strict liability \*
  - D. None of the above
  
5. In a strict liability lawsuit, if the defendant can show that he followed all of the applicable safety statutes and practices:
  - A. He will not be liable
  - B. The procedures will protect him from punitive damages, but not other types of damages
  - C. He may still be liable \*
  - D. None of the above

6. A condition of unusual or extreme dangerousness.

- A. A negligent activity
- B. A remote cause
- C. An ultra hazardous activity \*
- D. None of the above

7. Prior to the late 1800's in the United States, when a plaintiff sued a defendant who was engaged in dangerous activity, the plaintiff was forced to rely upon what theory?

- A. Product liability
- B. Strict liability
- C. Intentional tort
- D. Negligence \*

8. This case, decided in 1868, was one of the first to develop the concept of strict liability.

- A. Brown v. Board of Education
- B. Ruffin v. Commonwealth
- C. Plessy v. Ferguson
- D. Rylands v. Fletcher \*

9. This case was one of the first to establish the concept of strict liability.

- A. In re Hodgson
- B. MacPherson v. Buick Motor Company \*
- C. Dred Scott v. Sanford
- D. Dryden v. Scott

10. What condition was at issue in the Rylands v. Fletcher case?

- A. A defective ship engine
- B. An explosion during road construction
- C. A flooding of a mine \*
- D. A fire at a storage warehouse

11. Owners of wild animals that cause injury are held to a strict liability standard because:

- A. Wild animals are notoriously difficult to control
- B. Wild animals are inherently dangerous
- C. Owners of wild animals are considered to be on notice that the animal is dangerous
- D. All of the above \*

12. An owner of a domestic animal is usually not held to a strict liability standard. Why?
- A. Because domesticated animals can be controlled
  - B. Because domesticated animals are considered to be tame and therefore not dangerous
  - C. Owners of domestic animals can be held to a strict liability standard when their domestic pet has injured others
  - D. All of the above are reasons \*
13. The rule, "Every dog gets one free bite":
- A. Is true in all jurisdictions
  - B. Has been modified in some jurisdictions because of the violent propensities of certain breeds of dog \*
  - C. Has been abolished in all jurisdictions
  - D. All of the above
14. An example of a breed of dog that has been ruled to be dangerous and would therefore place its owner in the position of strict liability for any injuries caused by the dog is:
- A. Pit bull \*
  - B. Beagle
  - C. Saint Bernard
  - D. All of the above
15. One way of limiting product liability lawsuits is by:
- A. Legislating a short statute of limitations \*
  - B. Preventing plaintiffs from bringing product liability lawsuits at all
  - C. Refusing to enforce judgments entered in product-liability lawsuits
  - D. None of the above
16. Product-liability lawsuits came into their own during what time period?
- A. 1850
  - B. 1900
  - C. 1920
  - D. 1960 and beyond \*
17. One point of particular concern in strict liability lawsuits is:
- A. The identity of the plaintiff
  - B. The applicable statute of limitations \*
  - C. The rules regarding certificate of service
  - D. None of the above

18. When a manufacturer of a product is liable for any injuries caused by the product, regardless of his fault or the fact that he followed safety precautions.

- A. Product Liability \*
- B. Law of Warranties
- C. Law of Cause and Effect
- D. The rule of Interstate Commerce

19. A typical product-liability lawsuit might involve:

- A. An exploding soda bottle \*
- B. A computer that does not work properly
- C. A product delivered that does not meet the consumer's specifications
- D. All of the above

20. The public policy behind product-liability lawsuits is:

- A. To discourage companies from creating new products
- B. To encourage plaintiffs to seek monetary damages
- C. To encourage manufacturers to create safer products \*
- D. To spread the wealth of multinational corporations

21. In the 1800's, if a consumer were injured by a defective product, under what theory would he bring his suit?

- A. Product-liability
- B. Negligence theory \*
- C. Intentional torts
- D. None of the above

22. Historically, when product liability lawsuits were based on contract theory, this element was required as part of the plaintiff's case:

- A. A special relationship between the plaintiff and the manufacturer
- B. Privity of contract between the plaintiff and the manufacturer \*
- C. A written contract between the plaintiff and the manufacturer
- D. None of the above

23. One of the concerns of the judiciary in the United States for many decades was that by allowing product-liability lawsuits to go forward:

- A. There would be a flood of litigation
- B. Business interests would be hurt by large jury awards
- C. The economy would suffer because of mass litigation
- D. All of the above \*



24. A case that was decided in the mid-1800s in England, adopted in the United States and had the effect of dramatically limiting cases involving strict liability and product liability. That case was:

- A. Winterbottom v. Wright \*
- B. Ruffin v. Maryland
- C. Plessy v. Ferguson
- D. Armand v. Lestat

25. One of the problems with early legal theory about strict liability and followed liability lawsuits was:

- A. It did not allow third parties any avenue for claims of relief from injuries they sustained from defective products
- B. It failed to recognize an important shift in society away from direct contact between consumers and manufacturers
- C. It allowed corporations to put safety considerations secondary to profits
- D. All the above \*

### True-False (10)

1. Under strict liability analysis, the court does not inquire into whether or not the defendant was at fault. (T)
2. Under strict liability analysis, a defendant is only liable to those plaintiffs who could foreseeably be injured. (F)
3. The processing and shipment of natural gas has been ruled to be an abnormally dangerous activity. (T)
4. Prior to the 1800's in the United States, plaintiffs who could not prove negligence on the part of the company that injured them, had no other recourse under the law. (T)
5. The warranty of fitness for a particular purpose is the manufacturer's assurance that the product will perform normally and safely. (F)
6. Express warranties are statements about the product that are inferred from the manufacturing process or from the advertising of a product. (F)
7. The theory behind strict liability is that there are some activities that are so dangerous that a person is liable for any harm caused by them, whether or not he was negligent. (T)
8. Strict liability is not actually based on the defendant's level of fault. (T)
9. The *MacPherson v. Buick Motor Company* helped establish products liability law in the United States. (T)
10. In the United States, the principle in the *Rylands* case was adopted swiftly. (F)

# Chapter 11

## Defamation

### Lecture Outline

*Outline discussion:* Although defamation cases are more rare than negligence cases, this material is important in that it trains the students in the important function of analyzing a set of facts and applying those facts to the law.

### Chapter Outline:

#### I. Introduction

##### A. A Case of Defamation?

#### II. Defamation

##### A. What is defamation?

##### B. Defamation Comes in Two Forms

##### C. The Elements of Defamation

###### 1. Defamatory Language

###### a) Opinions

###### 2. False Statements

###### 3. The Statement Refers to the Plaintiff

###### a) Is it Possible to Defame A Group?

###### 4. Publication

###### 5. Injury to the plaintiff's reputation

###### a) When the Plaintiff's Reputation is Already Bad

##### D. Simple Libel

###### 1. What is a Writing?

###### 2. Libel Per Quod

###### 3. Libel Per Se

##### E. Slander

###### 1. Defining Slander

###### 2. Slander Per Se

###### 3. Special Damages

###### 4. Is Libel more Serious Than Slander?

##### F. Defenses to Defamation

###### 1. The Statement is Not Defamatory

###### 2. The Defamed Person is Deceased

###### 3. Privileges

###### a) Absolute Privileges

###### b) Statement is True

###### 4. The Statement is True

###### 5. "Good Faith" Statutes

##### G. Damages

###### 1. Assessing Damages

##### H. Constitutional Limits on Defamation Actions

###### 1. Analyzing a Defamation Case for Constitutional Implications

###### 2. The New York Times Rule

- a) Malice
- b) Malice and Negligent Investigation
- 3. The Shifting Standard Depending on the Plaintiff's Notoriety

### III. Analyzing a "Case of Defamation"

- Skills You Need in the Real World: Balancing School and Work
- The Life of a Paralegal: Christina Truitt
- Chapter Summary
- Ethical Issues for the Paralegal: Conflicts of Interest
- Web Sites
- Forms and Court Documents: A complaint alleging libel

### Additional Web Resources

- Minnesota Defamation Law  
<http://www.abbottlaw.com/defamation.html>
- On Line Defamation (From AOL)  
<http://legal.web.aol.com/decisions/dldefam/>
- Defamation on the Internet  
<http://www.adidem.org/articles/DS5.html>

### Additional Assignments

1. Have the students draft complaints and answers based on actual incidents of defamation that they have experienced.

### Answers to Review Questions

1. What is the difference between libel and slander?

Libel is defamation in written form; slander is defamation in oral form. Other than that, they are very similar.

2. How is libel per se different from slander per se?

Libel per se is any writing (including a drawing) about a specific category of defamatory statement that is considered to be so serious that an injury to the plaintiff's reputation may be presumed. Slander per se is very similar to libel per se. When the defendant accuses the plaintiff of committing a crime involving theft or dishonesty, or of having a communicable sexual disease, slander per se is triggered and the plaintiff is entitled to special damages.

3. Can a cartoon be considered defamatory? If so, what type of defamation is it?

Yes, it would be considered defamation.

4. Mailing a letter to the plaintiff is usually not considered to be publication. Why?

Because a letter is addressed to a specific person and if it goes to the plaintiff, then there would be no publication of the defamatory statement.



5. How is the Restatement definition of defamation (Figure 11-1) different from the general definition of defamation (Figure 11-2)?

The Restatement position emphasizes negligence in making the statement while the more traditional definition of defamation emphasizes the false nature of the statement and the proximate cause analysis.

6. Can a family be defamed? Why or why not?

Yes, if the family has been defamed by a specifically addressed statement.

7. Explain the term "publication."

When a person publishes a defamatory statement, he communicates that statement to someone other than the plaintiff.

8. Why is it necessary that the plaintiff prove publication in order to be successful in his defamation action?

The requirement of publication ensures that someone other than the plaintiff hear the defamatory statement and thus something that would affect the plaintiff's standing in the community.

9. Is libel potentially more damaging to the plaintiff than slander? If so, how?

You could easily claim that libel is more damaging to the plaintiff than slander, since libel is a more permanent form than slander.

10. How can the plaintiff prove that his reputation was damaged?

He can show how his general character has suffered, or also how his business or other personal interactions have been affected.

11. What is "libel per quod?"

Libel per quod is a statement that may appear innocuous when standing by itself, but become clearly defamatory when other facts are considered.

12. In libel per se, malice is often presumed. Why?

Because the statement concerns a matter that is so damaging, such as an allegation that the defendant has a sexually transmitted disease, that a false statement about such a topic would be considered to damage his reputation and thus would be motivated by malice.

13. It is often said that truth is an absolute defense to defamation. Explain.

One of the main requirements of a defamation case is that the statement is false; if the statement is true, one of the crucial elements of a defamation case is missing.

14. Other than truth, what types of defense are available in a defamation action?

- The Statement is Not Defamatory
- The Defamed Person is Deceased
- Privilege



15. Explain the difference between an absolute privilege and a qualified privilege.

An absolute privilege will prevent a suit for a statement, while a qualified privilege may or may not.

16. Why does a celebrity receive less protection under defamation law than a private person?

A celebrity is someone who has deliberately placed himself in the public eye and as a consequence has surrendered the rights that a private individual still possesses.

17. How do courts balance the First Amendment right of freedom of speech against a person's right to bring a defamation action?

Courts attempt to balance constitutional rights against individual freedoms by applying a test to evaluate a statement. Courts review the statement and first ask if a constitutional right is involved; if it is, the statement is more likely to be considered non-defamatory.

18. What is the "New York Times Rule?"

The New York Times rule is the holding from *New York Times v. Sullivan* in which the United States Supreme Court ruled that when a statement is made by the press, and concerns a public figure or a matter of public concern, then a plaintiff who seeks to sue for the statement must show actual malice.

19. What is "actual malice?"

Actual malice is the court-created test that must be applied to cases of defamation where the person defamed is a public figure, or when the statement concerns a matter of public debate. Under actual malice, the plaintiff must show that the defendant made a false statement willfully, or with reckless disregard for the truth. This raised the standard in such cases from the previous requirement of simple malice.

20. Read the case excerpt. Why did Reverend Falwell lose? What was the court's reasoning? Does this case make sense? Why or why not? What fact, if changed, might have changed the outcome of the case? What if Reverend Falwell were simply a local minister? Would that have changed the outcome? Why or why not? Why does the court discuss cartoonists like Thomas Nast and the "Boss Tweed" case?

This case centered around the fact that Rev. Falwell was a public figure who had deliberately sought to gain fame and recognition. Under the U.S. Supreme Court tests, Rev. Falwell qualified as a public figure and under the ruling in *New York Times v. Sullivan*, the only way that he could proceed under defamation was to prove actual malice. The court was not inclined to find actual malice when the statement at hand was a parody. Parody has always enjoyed greater protection under the law, primarily because it is a way for political dissenters and others to make a point about public policy.

## Answers to “Applying What You Have Learned”

1. One evening, Ted, the news anchor at a local television show, reads the following from his prepared TV script, “In the news today, John Doe has been arrested and charged with child molestation.” Ted pauses, and then, adlibbing, says, “Man, that guy is always getting into trouble. Someone should teach that pedophile a lesson.”

In fact, John Doe has not been arrested or charged with any crime and has never been in trouble with the law before. Does John have a cause of action for defamation against Ted? If so, what type of action can he bring? Explain your answer.

Ted’s statement, since it is apparently “off the cuff” and unscripted, would probably be classified as slander. However, since Ted’s statement concerned one of the issues covered by slander per se (accusation of a crime), John Doe will most likely be permitted to bring his case under the theory of special damages presumed. Ted will most likely lose this case.

2. Draft an Answer to the Complaint in the “Forms and Court Documents” section. What constitutional issues may also be involved in this case?

Answer will vary according to the student.

3. Draft a complaint based on the “Case for Defamation.” What are the possible defenses that a defendant might use in an Answer?

Answer will vary according to the student.

## Test Bank

### Essay Questions (5)

1. Explain the difference between libel and slander.
2. How is the tort of defamation different from towards involving a negligence or product-liability?
3. Explain the defenses available to a defamation action.
4. Explain libel per quod.
5. How does the law of privilege apply to defamation actions?

### Short Answer (10)

1. What is libel per se?
2. How are the rules of defamation different when the person defamed it is a celebrity or a public official?
3. Explain the term publication as it relates to defamation?
4. What is the justification for allowing plaintiffs to bring actions for defamation?
5. How has the term publication been altered by the use of the Internet?
6. What is the New York Times rule?
7. What to the courts mean by the term “actual malice?”

8. Are there material differences between the elements of slander and defamation?  
If, so what are they?
9. Under what situations can an opinion be considered defamatory?
10. Is it possible to defame a group of people?

### Multiple Choice (25)

1. Oral defamation:

- A. Libel
- B. Slander \*
- C. Slander per se
- D. Intentional infliction of emotional distress

2. Written defamation:

- A. Libel \*
- B. Slander
- C. Slander per se
- D. Intentional infliction of emotional distress

3. The cause of action for a victim whose reputation has been injured.

- A. Intentional infliction of emotional distress
- B. Loss of consortium
- C. Defamation \*
- D. Alienation of Affections

4. The theory behind making defamation a tort:

- A. Is that a plaintiff should not have to listen to bad words
- B. Is that a plaintiff should have a cause of action to protect his reputation and his standing in society \*
- C. Is that a plaintiff should be able to force others to adopt a good opinion of him
- D. None of the above

5. The term used to describe the fact that a defamatory statement was read or overheard by someone other than the plaintiff.

- A. Responsibility
- B. Character assassination
- C. Publication \*
- D. None of the above

6. The case that established the "actual malice" test.

- A. New York Times v. Sullivan \*
- B. State v. Broderick
- C. Ruffin v. Commonwealth
- D. Brown v. Board of Education

7. Which of the following types of statements is not defamatory?

- A. Insults
- B. Hurtful statements
- C. Opinions
- D. All of the above are classified as non-defamatory statements \*

8. John is an employer who has just received a resume from Terry. He calls up Terry's previous boss and asks some questions about Terry. In response to his question about Terry's work ethic, Terry's previous employer responds, "Terry is a thief and a liar. I know for a fact that she stole money from my firm. " Is this statement defamatory?

- A. Yes, because Terry's previous employer said bad things about her
- B. Yes, because it was a statement that injured Jerry's reputation and was communicated to a third person \*
- C. No, because Terry was not present when that statement was made
- D. No, because an employer is entitled to say such things about previous employees

9. When a defamatory statement is made about a group of people:

- A. Any member of the group may sue for defamation
- B. Members of the group may sue for defamation when they have been clearly identified or associated with the defamatory statement\*
- C. No members of the group may sue for defamation under any circumstances
- D. None of the above



10. John makes a statement about Ron in which he states that Ron is a convicted thief. However, John does not use Ron's name. Instead, he points to Ron, makes his statement, and then says, "That guy in the red jacket." Ron is the only person wearing a red jacket. Does Ron have a defamation action against John?

- A. Yes, because Ron was a clearly identifiable to the group and the statement was defamatory \*
- B. Yes, because John's s statement was made in front of other people and it hurt Ron's feeling
- C. No, because Ron was not named by John
- D. No, because the statement is not defamatory

11. John makes an insulting and factually incorrect statement about a group of people. He accuses members of the group of being convicted felons. Terry, who is standing nearby, believes that John is referring to her. Does Terry have a defamation action against John?

- A. Yes
- B. No, because Terry is not a convicted felon
- C. No, because the connection to Terry is tenuous and Terry is unable to prove that she was clearly identifiable as a member of the group
- D. No, because Terry has failed to allege any special relationship between herself and John

12. John is having a private conversation with Terry. In the conversation, John accuses Terry of being a thief. Terry wishes to sue John for slander. Does she have a cause of action?

- A. Yes, because John made a defamatory statement
- B. Yes, because Terry experienced humiliation because of John's statement
- C. No, because accusing someone of being a thief is not defamatory
- D. No, because there was no publication \*

13. Rhonda writes a note to Ted. The note says, "You are a liar. No one should ever believe a word that you say." Before she can deliver the note, it is intercepted by Sheila. She reads the note. Does Ted have a cause of action for libel?

- A. Yes, because Rhonda's defamatory statement was published to a third-party
- B. Yes, because Rhonda made a defamatory statement about Ted
- C. No, because the statement was never meant to be published \*
- D. No, because Ted never received the note

14. Mark and Barbara both speak Spanish. One day, Mark tells Barbara that she is a liar and has a sexually transmitted disease. He says this to her in Spanish. There are five other people standing very close to Mark and Barbara when he makes the statement. However, none of them speak Spanish. Does Barbara have a cause of action for slander?

- A. Yes, because Mark made a defamatory statement
- B. Yes, because Mark made a defamatory statement and it was published to the other people
- C. No, because publication requires that someone other than the plaintiff both hear and understand the statement \*
- D. No, because Mark's statement is not defamatory

15. In cases of simple slander or simple libel, the plaintiff must prove special damages. What are special damages?

- A. The humiliation and harassment on the part of the plaintiff
- B. Financial and other losses directly tied to the defamatory statements \*
- C. Special damages refers to the defendant's intent
- D. There is no such category as special damages

16. John Anderson, an admitted jewel thief, sees an article written about himself in a local newspaper. The article refers to John as an "immoral thief." John brings a libel action against the newspaper. What is the likely result?

- A. John's defamation action will succeed
- B. John's defamation action will succeed because the statement is not defamatory \*
- C. John's defamation action will succeed, because the article hurt his feelings
- D. None of the above

17. Under libel, the definition of "writing" includes:

- A. Drawings
- B. Pictures
- C. Cartoons
- D. All of the above are considered to be "writing" \*

18. The type of defamatory statement that must be interpreted or related to other facts before its defamatory nature is understood.

- A. Libel per se
- B. Slander per se
- C. Actual malice
- D. Libel per quod \*

19. A defamatory statement, made in writing, alleging a specific category of statement that is so damaging to the plaintiff's reputation that damages against him are presumed.

- A. Liable per se \*
- B. Slander per se
- C. Libel for cause
- D. None of the above

20. Which of the following statements would qualify as libel per se?

- A. An accusation that the defendant is a convicted felon
- B. An accusation that the defendant has a sexually transmitted disease
- C. An accusation that the defendant is not a good person
- D. A and B, but not C \*

21. John publishes an article in the school newspaper that wrongly states that Mary has contracted syphilis after having sexual relations with several other men. Which type of defamatory action should Mary bring?

- A. Libel per quod
- B. Slander per se
- C. Slander
- D. Libel per se \*

22. When the statement is made during a news broadcast that is televised, how is this defamatory statement classified?

- A. It is always slander
- B. It is always libel
- C. It depends on whether the statement was part of the script or was made as an offhand comment by the newscaster \*
- D. None of the above

23. Those types of damages that are available to a plaintiff that are beyond simple humiliation or embarrassment in a defamation action:

- A. Nominal damages
- B. Loss of consortium
- C. Special damages \*
- D. There is no such category of damages

24. In a Letter to the Editor that is captioned, "Why the County Attorney is no good for us," that is published in the local newspaper, Jim writes, "I don't understand why this city would allow a man to serve in the county attorney's office when he has been disbarred." The County Attorney, who is a member in good standing of the state bar, sues for defamation. Does he have a cause of action?

- A. Yes, because it is defamation to accuse someone of not being qualified to practice his profession \*
- B. Yes, because Jim obviously meant for the statement to be taken as a joke
- C. No, because lawyers are expected to put up with statements that other people would consider to be insulting
- D. No, because Jim obviously did not intend to make a defamatory statement

25. This defense, which is very common in defamation actions, is not a defense you typically see in any other type of civil injuries case:

- A. Consent
- B. Assumption of the risk
- C. Truth \*
- D. None of the above

### **True-False (10)**

1. Publication is a requirement for libel, but not for slander.
2. One of the main requirements of a defamation action is a physical injury on the part of a plaintiff.
3. Publication refers to having the statement reproduced in a newspaper or book.
4. When a defamatory statement is made in writing, it is referred to as slander.
5. When a defamatory statement is made verbally, it is referred to as libel.
6. When a celebrity or a public official raises a claim of defamation, he or she must show actual malice on the part of the person making the statement.
7. Defamatory language is any statement which holds the plaintiff up to public ridicule, humiliation or contempt.
8. In order to qualify as a defamatory statement, the statement must be false.
9. In order for defamation to exist, the defamatory statement must be heard, read and understood by someone other than the plaintiff.
10. When a plaintiff alleges libel per se, he must prove his damages; they are not presumed.





## Chapter 12

### Malpractice

#### Lecture Outline

*Outline discussion:* both medical and legal malpractice are highly specialized areas of law and often involve large judgments obtained against defendants. If that were not enough to justify its discussion, this chapter will also extensively address the paralegal's role in helping to prevent claims of legal malpractice.

#### Chapter Outline:

- I. Chumley and Malpractice
- II. Introduction to Professional Malpractice
- III. What is Malpractice?
  - A. A Brief History of Medical Malpractice
  - B. Defining Medical Malpractice
  - C. What is the Basis for a Medical Malpractice Case?
    - 1. Battery
    - 2. Contract
    - 3. Negligence
- IV. The Basic Elements of a Medical Malpractice Claim
  - A. Duty
    - 1. The Physician's Duty to the Patient
  - B. Breach
    - 1. Defining the "Standard of Care"
    - 2. Modern Approaches to Standard of Care
      - a) Level of Experience
      - b) National vs. Local Standards
      - c) Establishing Standard of Care by Statute
      - d) Elements to Consider in Establishing the Standard of Care
    - 3. Expert Testimony in Medical Malpractice Cases
    - 4. Specialists
  - C. Proximate Cause in Medical Malpractice Cases
  - D. Damages
    - 1. Specific Types of Injuries
      - a) Wrongful Birth
      - b) Wrongful Death
    - 2. Punitive Damages
    - 3. Punitive Damages and Tort Reform
- V. Informed Consent
  - A. Statutory Requirements in Informed Consent

- B. Emergencies
- C. Scope of Informed Consent
- VI. Pleadings in Medical Malpractice Cases
- VII. Discovery Issues in Malpractice Cases
- VIII. Defenses to Medical Malpractice Claims
  - A. Statute of Limitations
  - B. Contributory Negligence of the Patient
- IX. Case Excerpt – Medical Malpractice – Is it a contract case or a torts case?
- X. The Chumley Case: Follow Up on Medical Malpractice Issue
- XI. Legal Malpractice
  - A. The Attorney's Duty
  - B. Breach of Duty
    - 1. Additional Proof of Breach Required
      - a) Legal Negligence Per Se?
    - 2. Expert Testimony
  - C. Proving damages
  - D. Defenses in Legal Malpractice Cases
- XII. Other types of Professional Malpractice
  - Skills You Need in the Real World: Medical records reviewing and summarizing
  - Life of a Paralegal – John Purvis -- Screening and Evaluating Medical Malpractice Cases
  - Chapter Summary
  - Ethical Issues for the Paralegal: Fee Splitting/Fee Sharing
  - Web Sites
  - Forms and Court Documents: Medical Malpractice Complaint

### **Additional Web Resources**

- 'Lectric Law – Medical Malpractice  
<http://www.lectlaw.com/tmed.html>
- University of Washington School of Medicine  
<http://eduserv.hscer.washington.edu/bioethics/topics/consent.html>
- Missouri Bill to modify Informed consent in experimental treatments  
<http://www.senate.state.mo.us/03INFO/bills/SB431.htm>

### **Additional Assignments**

1. Review the facts of a recent news story concerning a person who was injured by purportedly substandard medical care. Have the students engage in a discussion about whether the case qualifies as a medical malpractice case.

## Answers to Review Questions

1. If the first medical malpractice case was filed in 1794, why are medical malpractice cases considered to be such a pressing and immediate problem?

This answer will vary according to the student.

2. How has the medical profession's standard of care changed in the past two centuries? How has this standard of care and the treatment of patients affected the societal standing of physicians?

In the past, doctors had a low social standing, but with an increase in the standard of care, and the improvements in medical treatment, as well as the educational requirements imposed on physicians, the profession's standing has risen considerably.

3. Medical malpractice cases can be based on one of at least three different theories. What are they?

The three theories are: Battery, Contract violation and negligence

4. Why are the courts reluctant to frame all medical malpractice cases in terms of contract theory? Is there some public consideration that puts the physician-patient outside the framework of a simple contractual relationship?

Courts are reluctant to use contract theory as the exclusive basis for the malpractice actions because the physician-patient relationship is inherently different than an arm's length transaction between business partners. For one thing, the patient is often at a distinct disadvantage in negotiating with the physician, for another, courts may be reluctant to base medical malpractice on contract theory out of the fear that doctors (and insurance companies) might attempt to draft contracts that prevent malpractice actions.

5. What are the basic elements of a medical malpractice claim?

Like negligence, a medical malpractice claim involves the proof of the physician's duty to the patient, the breach of that duty, a finding of proximate cause flowing from the physician's breach and the plaintiff's additional injury, and the plaintiff's provable damages.

6. What are some examples of the ways in which a physician can breach his/her standard of care to the patient?

A physician can breach the standard of care by failing to follow the procedures and diagnoses of other similar professionals, with the same background and training.

7. Why is expert testimony needed to prove the basic elements of the plaintiff's case?

The simple answer is that the laypeople found on the jury would be hard pressed to understand the procedures involved, let alone how the attending



physician breached that duty. Expert testimony is also a statutory requirement in some jurisdictions as an affidavit attached to the plaintiff's complaint.

8. Why would many states/jurisdictions require an expert's affidavit before the plaintiff's complaint can be filed? Is there some public policy behind this requirement?

This policy was instituted as a way of weeding out specious claims at the outset of filing. If no expert is willing to sign such an affidavit, that would prevent filing an action in the first place.

9. Under the law of medical malpractice, a recent graduate of medical school and a seasoned veteran physician are held to the same standard of care. Does this make sense? Why or why not?

This answer will vary according to the student's opinion.

10. Many jurisdictions have moved away from local definitions of the standard of care. Why?

In many ways, local standards gave physicians too much flexibility in determining the standard of care. By applying a more uniform standard, courts could apply a standard of care to all practitioners. Additional reasons include the fact that doctors have continuing education requirements and, through technology, are not as secluded as they once were.

11. A specialist is held to a different standard of care. What is it?

Specialists are required to exercise the same degree of skill and care as other practicing specialists found nationwide.

12. Why should a specialist be held to a different standard of care than a general practitioner?

Answers to this question will vary according to student opinion.

13. How have various "Tort Reforms" affected the way that a medical malpractice case is brought or how damages are assessed in such cases?

One important limitation that has been followed in many states is a treble limit on punitive damages. In these cases, the plaintiff's punitive damages claim is limited to an amount that is three times the amount of proven compensatory damages. Tort reform also focuses on the statutes of limitation for medical malpractice cases.

14. Why would many different state legislatures enact "caps" or limits on punitive damages awards?

This is in direct response to a perception that juries are constantly awarding windfalls to plaintiffs who bring such suits.

15. Should punitive damage awards be limited in medical malpractice cases? Why or why not?

This answer will vary according to student opinion.

16. What is “informed consent?” What elements must be established to show that the plaintiff gave informed consent?

The general rule is that before a medical procedure can be performed, the doctor must obtain consent from the patient. This consent acts to insulate the doctor from any claim of battery,

17. What is an exception to the requirement that informed consent must be obtained prior to carrying out any procedure?

In situations involving emergencies, physicians are not required to obtain informed consent because doing so might result in the patient’s death before such consent could be obtained.

18. Explain what the “scope” of informed consent is.

The scope of the informed consent is limited to the procedure that was contemplated and any closely associated procedures.

19. Some law firms employ Legal Nurse Consultants or Nurse Paralegals to assist with medical malpractice cases. How could such individuals be helpful?

They could certainly help decipher medical records, explain medical procedures and help to educate legal professionals on various topics in the medical field.

20. What are some of the defenses available in medical malpractice cases?

Among the defenses available in medical malpractice cases are statute of limitations and contributory negligence,

21. How is legal malpractice defined?

When a plaintiff brings a legal malpractice claim, he or she is alleging that the attorney failed to perform his professional duties and that failure resulted in an identifiable loss to the client.

22. What is the attorney’s duty to the client?

An attorney must exercise the same level of skill, legal knowledge and ability for the client as is found in other members of the bar.

23. Is expert testimony ever used in legal malpractice cases? If so, how?

Expert testimony is used in legal malpractice cases to help establish the standard of care and to establish the breach of care.

24. What are some ways that a paralegal can help a firm avoid a claim of legal malpractice?

Documentation is critical in avoiding claims of legal malpractice. By documenting what was done in the case, the firm may be able to show that the client’s malpractice action is groundless.

25. Explain the difference between a narrative medical summary and a page-by-page medical summary.

The narrative summary consists of an overall description of the treatment that the plaintiff received, when he received it and by whom. A page-reference summary provides page by page, and often line by line, summarizes of what exactly happened in each record.

### **Answers to “Applying What You Have Learned”**

1. Nancy has decided to undergo a radical, new therapy to cure her cancer. There is only doctor in the country who practices this procedure. When Nancy meets with the physician, the doctor takes great pains to point out to her what the risks of this procedure are. After listening to everything that the doctor has to say, Nancy decides to go ahead with the procedure. During the treatment, an unexpected complication develops. Nancy's doctor realizes that another procedure must be used. Should the doctor obtain a new informed consent from Nancy?

It depends on the nature of the threat. If the new procedure is something that qualifies as an emergency, or even a procedure that could have been anticipated, the doctor will probably not need a new informed consent. However, if the new procedure is neither an emergency nor something contemplated by the original procedure, he will most likely be required to obtain a new consent.

2. Drew, who suffers from obesity, decides that he wants to undergo an operation that will reduce the size of his stomach. Commonly referred to as “stomach stapling,” Drew will be physically unable to eat as much food as was before the procedure and should, therefore, lose weight. When the doctor appears in Drew's hospital room to tell him all about the procedure and obtain Drew's informed consent, Drew says, “I don't want to know the details. It grosses me out. I'll get sick if you tell me anything. I trust you. Just do it.” Is this a valid informed consent? Is there anything that the doctor can do to prevent, or at least minimize, any medical malpractice claim that Drew may have later because of lack of informed consent?

The doctor should document Drew's refusal to hear any details about the procedure and should probably confirm with Drew that he doesn't wish to know about the procedure. The doctor might also insist that Drew be made aware of the dangers of the procedures, despite Drew's protests.

3. Draft a complaint based on the facts in the Case Excerpt. How would you allege a breach of the standard of care in that case?

Student responses will vary.



## Test Bank

### Essay Questions (5)

1. Explain the basis for a cause of action for professional malpractice.
2. How is the standard of care in malpractice cases different than the standard of care in negligence cases?
3. Explain how physicians can be held to either a local standard of care or a national standard of care.
4. Explain the role of the expert witness in medical malpractice cases.
5. How and under what circumstances can an action for legal malpractice be brought?

### Short Answer (10)

1. What are some of the typical tort reform approaches to medical malpractice?
2. What is "informed consent?"
3. Explain how a paralegal would prepare a medical record summary.
4. How are the rules regarding statutes of limitation different for medical malpractice actions?
5. What is meant by fee splitting?
6. Explain the difference between a professional and a specialist.
7. What is a wrongful death action?
8. What is a wrongful birth action?
9. Explain how a plaintiffs' firm might evaluate a medical malpractice claim.
10. What other types of professionals can face malpractice actions?

### Multiple Choice (25)

1. Another term for professional Negligence:
  - A. Negligence per se
  - B. Malpractice \*
  - C. Vicarious liability
  - D. None of the above
2. Malpractice cases can be based on what theory of tort law?
  - A. Negligence
  - B. Intentional torts
  - C. Contract theory
  - D. A malpractice case can be based on any of the above theories \*



3. One of the problems when assessing damages in medical malpractice cases is that:

- A. Frequently, the plaintiff has no such injuries
- B. Most plaintiffs raise false claims
- C. The plaintiff is already injured when he seeks professional help \*
- D. None of the above

4. Dr. Barbara is driving to work one day and is involved in an automobile collision. John, the other driver, brings a medical malpractice case against Dr. Barbara, alleging that she was driving negligently at the time of the collision. Does John have a cause of action against Dr. Barbara for medical malpractice?

- A. Yes, because Barbara is a doctor
- B. Yes, because Barbara was engaged in professional duties at the time of the collision
- C. No, because doctors cannot be sued when they are engaged in driving to and from work
- D. No, because Barbara was not engaged in professional duties at the time of the collision \*

5. Tort reform often focuses on which of the following?

- A. Limiting the applicable statute of limitations.
- B. Limiting punitive damages awards
- C. Increasing the requirements for bringing a medical practice case in the first place
- D. All of the above \*

6. The plaintiff in a medical malpractice case must prove:

- A. That the physician owed a duty to him
- B. That the physician breached a duty to him
- C. That there was a doctor-patient relationship
- D. All of the above \*

7. The first medical malpractice case in the United States was brought during which century?

- A. The 1700's \*
- B. The 1800's
- C. The 1900's
- D. None of the above

8. What is the "Medical malpractice crisis?"

- A. The fact that juries have awarded a multi-million dollar awards against doctors
- B. The fact that malpractice insurance premiums have risen dramatically over the past two decades
- C. The fact that educational standards have slipped dramatically in the past 10 years
- D. A and B, but not C \*

9. One of the reasons why the medical profession was held in such low esteem in the 1800's was that:

- A. There was no standardized medical education
- B. Physicians were often not licensed
- C. Little was known about proper care and hygiene
- D. All of the above \*

10. When a physician operates on the plaintiff without the plaintiff's consent and in a situation that does not involve an immediate threat to the plaintiff's life:

- A. This can be the basis for a medical malpractice action based on violation of contract
- B. This can be the basis for a medical malpractice action based on the intentional tort of battery \*
- C. There is no cause of action
- D. None of the above

11. The vast majority of medical malpractice cases are based on what theory of law?

- A. Intentional torts
- B. Negligence \*
- C. Breach of contract
- D. None of the above

12. Some legal commentators have said that basing malpractice actions solely on contract theory would violate public policy. Which of the following statements is an accurate reflection of the concerns of public policy?

- A. Basing a medical malpractice action on contract theory is virtually impossible because there is no contract between physician and patient
- B. Basing a medical malpractice action on contract theory ignores the complexities of the physician patient relationship and the fact that society expects more from a physician than it does from the party to a contract
- C. Limiting malpractice actions to contract claims might severely limit plaintiffs' causes of action
- D. B and C, but not A \*

13. The term used to describe the type of knowledgeable permission given by the patient for the procedure to be performed by the physician.

- A. Latent defect
- B. Contractual awareness
- C. Informed consent \*
- D. None of the above

14. Which of the following persons can be the subject of a medical malpractice action?

- A. Physician
- B. Dentist
- C. Psychiatrist
- D. All of the above \*

15. One exception to the requirement of obtaining informed consent prior to performing a medical procedure is:

- A. A life-threatening emergency \*
- B. The plaintiff's reluctance to give informed consent
- C. The staffing crisis at the hospital
- D. None of the above

16. When a physician exceeds the scope of the informed consent:

- A. It does not give the plaintiff any cause of action for medical malpractice
- B. It may give the plaintiff a cause of action for a medical malpractice claim \*
- C. The physician can claim "Good-faith" in exceeding the scope of the informed consent
- D. None of the above

17. What is the standard of care in medical malpractice cases?

- A. That the physician use reasonable skill, care and expertise to ensure the safety and well-being of the patient \*
- B. That the physician use the skill that a reasonable person would use in a similar circumstance
- C. That the physician live up to the expectations of the plaintiff-patient
- D. All of the above

18. Which of the following statements is true about firms that handle medical malpractice claims?

- A. Plaintiffs' firms turn down many more cases than they accept
- B. Doctors who are sued are usually represented by attorneys who are paid by the hour
- C. If the plaintiff loses his suit, his attorney usually also receives nothing
- D. All of the above \*

19. This type of summary consists of an overall description of the treatment that the plaintiff received, when he received it and by whom.

- A. Narrative summary \*
- B. Chronological summary
- C. Patient summary
- D. In-vitro summary

20. Which of the following professions has been sued for malpractice?

- A. Lawyers
- B. Educators
- C. Counselors
- D. All of the above \*

21. In legal malpractice, what type of damages is the former client permitted to recover?

- A. All physical, financial and emotional losses related to his underlying legal claim
- B. The amount of money he would have received if the attorney had not committed legal malpractice \*'
- C. Only the amount of money that he has put out in bringing the malpractice action
- D. B and C, but not A



22. An Attorney is being sued by a former client. The client alleges that An violated an ethical rule while representing him. The client wishes to sue under the theory of negligence per se. Can he proceed under this theory?

- A. Yes, since the attorney violated a statute, the client can sue under negligence per se
- B. Yes, but the client can only sue when the attorney admits that he violated an ethical standard
- C. No, because negligence per se is no longer a recognized legal theory in any jurisdiction
- D. No, because most jurisdictions have not applied negligence per se to ethical rules \*

23. What is an attorney's standard of care to his client?

- A. An attorney must exercise the same level of skill as required by the standards of the American Bar Association
- B. An attorney must exercise the same level of skill, legal knowledge and ability for the client as is found in other members of the bar \*
- C. An attorney must exercise that level of skill and diligence that his client expects
- D. None of the above

24. An act of negligence that is not discovered until some time after it has been committed is often referred to as:

- A. Vicarious liability
- B. Nolle prosequi
- C. Latent negligence \*
- D. Respondeat superior

25. A plaintiff's attorney might consider all of the following factors before deciding to take on a case, except:

- A. Is the case worth the time and effort it will take to complete it?
- B. Does the attorney have enough time to devote to the case?
- C. Is the plaintiff wealthy? \*
- D. How clear is the liability in the case?

### True-False (10)

1. Accountants can be the targets of a malpractice action. (T)
2. It requires training to read and review medical records. (T)
3. A professional can only be sued for malpractice for actions he or she carried out while actually performing the profession. (T)

4. Defendants in malpractice cases have the same standard of care as that seen in regular negligence cases. (F)
5. A non-consensual, non-life threatening medical procedure can be classified as battery. (T)
6. The applicable standard of care in medical malpractice cases varies depending on the experience level of the practitioner.(F)
7. In some states, the standard of care in medical malpractice cases is established by statute. (T)
8. In many jurisdictions, expert testimony is required in medical malpractice cases to establish a breach of the standard of care. (T)
9. Punitive damages are not permitted in medical malpractice cases. (F)
10. Most tort reform actions have not eliminated punitive damages in medical malpractice cases; instead, they have limited them. (T)



# Chapter 13

## Insurance

### Lecture Outline

*Outline discussion:* the complex world of insurance is addressed, with particular emphasis on the effect that coverage (or the lack) can have on the litigation itself; the role of insurance companies in defense is also explored.

### Chapter Outline:

- I. Mr. Chumley and the Insurance Company
- II. Introduction
- II. The impact of insurance on civil suits
- IV. History of insurance
- V. What is Insurance?
  - A. What can be insured?
- VI. The Insurance Contract
  - A. The Insurance Policy
  - B. State Laws Regarding Insurance Policies
- VII. Automobile Insurance
  - A. Statutory Minimum Liability Coverage
  - B. Liability Coverage
  - C. Bodily injury
  - D. Property Damage
  - E. Medical payments (MP)
  - F. Uninsured Motorist Coverage
  - G. Underinsured Motorist Coverage
  - H. Important Provisions in Typical Automobile Policies
    - 1. Duty to Defend
      - a) Failure to Defend
    - 2. Subrogation
    - 3. "Stacking" of policies
      - a) Limit of Liability Provisions and Stacking
  - I. "No-Fault" Insurance
    - J. Exclusions
      - 1. Intentional Injuries
      - 2. Other Exclusions
- VIII. How Insurance Coverage Affects Settlement
  - A. Discovery Issues With Insurance
  - B. Specialization Among Personal Injury Attorneys
    - 2. Plaintiffs' Firms
    - 3. Insurance Defense Firms
  - C. Settlement
  - D. Releases



- Skills You Need in the Real World: Deciphering Insurance Policies
- Life of a Paralegal – Leah Laidley – The differences between law firms and other types of offices
- Chapter Summary
- Ethical Issues for the Paralegal: Insurance Fraud
- Web Sites
- Forms and Court Documents: Declaratory Judgment on an Insurance Policy

### **Additional Web Resources**

- Auto Insurance In-Depth

<http://www.autoinsuranceindepth.com/optional-coverages.html>

- Texas Department of Insurance

<http://www.tdi.state.tx.us/consumer/consum86.html>

- Home Insurance Explained

<http://www.steersinsurance.com/homeinsx.htm>

### **Additional Assignments**

1. Have students bring in their automobile insurance policies and spend in class time exploring the provisions of the policy.

### **Answers to Review Questions**

1. How did the insurance industry develop over time? How does this history impact on modern cases?

Insurance developed out of a need for merchants to cover their potential losses when engaging in risky trading ventures.

2. List and discuss the parties to an insurance policy. What responsibilities does each of these parties have?

The parties to the insurance contract are the insurance company and the insured. The insurance company agrees to indemnify the insured for any losses covered by the policy and the insured agrees to make regular payments (premiums) to the insurance company in exchange for its promise to indemnify him.

3. How does insurance impact a civil suit?

Insurance has a huge impact on civil suits. Without insurance coverage what would normally be a good case for a plaintiffs' attorney might be one that he or she decides to pass up.

4. What types of coverage are common in automobile insurance policies?

The most common types of coverage include bodily injury, property damage and medical payments.

5. Explain the insurance company's "duty to defend?"

This refers to a promise of the insurance company to provide an attorney to the insured in the event that he is sued for some incident related to a claim covered by the insurance policy.

6. What is an insurance 'premium?'

This is the regular payment made by the insured to the insurance company.

7. How do states regulate the insurance industry?

States regulate the insurance industry in a wide variety of ways, including limits on the types of policies that can be issued, what the policy says, even to the size of the font type that can be used in a standard policy.

8. How does an insurance company owe fiduciary duty to an insured?

This duty arises because of the insurance company's position as the entity that indemnifies the insured against loss and also provides legal counsel for a claim arising from a covered loss.

9. Why do states require minimum automobile liability coverage for motorists?

The simple reason is that by requiring minimum coverage, the state is assuring that when people injure others in automobile crashes, there will be funds there to compensate the injured party.

10. Periodically, states enact new statutes requiring that insurance policies to be "readable" or "understandable." Why are such statutes necessary? Why don't insurance companies take the initiative and make their policies "understandable" without such statutes?

Student responses to this question will vary by individual opinion.

11. Explain the basic features of an automobile insurance policy.

The typical features of an automobile insurance policy include:

- Liability Coverage
- Bodily Injury
- Property Damage
- Medical Payments
- Uninsured Motorist/Underinsured Motorist

12. Explain the two components of liability coverage

Liability coverage is divided into bodily injury and property damage. These provisions cover the physical injuries to the insured and the damage to his vehicle resulting from a covered loss.

13. What is Uninsured Motorist Coverage?

Uninsured motorist coverage was created as a way of protecting motorists from other drivers who did not have insurance. Although it is a legal requirement to have automobile insurance, that does not stop some drivers from operating cars without it. In situations where these uninsured drivers cause accidents, the injured party would have no way to receive compensation.

14. Compare and contrast Uninsured Motorist Coverage with Underinsured Motorist Coverage. How are they alike? How are they different?

Although student responses will vary, certain elements should appear in this answer: they include the fact that both of these provisions are designed to give the insured the right to recover when the other driver's insurance coverage is inadequate (or non-existent).

15. List and explain the various parts of a typical insurance policy.

An insurance policy is composed of a declarations page, the policy itself and exclusions, among other features.

16. Explain subrogation.

Subrogation refers to the insurance company's right to "stand in the shoes" of the insured. Typically, subrogation is triggered when the insurance company pays out a claim and then seeks reimbursement from the person who caused the loss in the first place.

17. Explain stacking insurance policies

Stacking insurance policies means that two (or more policies) are combined, thus increasing the overall policy limits. Stacking is available when two or more policies are made available by additional coverage on the insured, or by the presence of others at the scene who are also covered by insurance.

18. How does "no fault" insurance differ from regular auto insurance?

No fault insurance is a type of insurance that requires an insurance company to pay for the insured's damages regardless of who was at fault in causing the damage. Under a no fault system, there is no inquiry into the causal agent of the damage. In states that do not follow a no fault model, assessment of fault is a primary concern.

19. What are the advantages of "no fault" insurance?

Under a no fault system an insured will have his claim paid faster. The other advantage, at least to the insurance company, is that an insured is more limited in the types of actions that he can bring both against the tortfeasor and the insurance company.



20. What are some of the typical exclusions found in insurance policies?

The typical exclusions would include intentional injuries by the insured and situations where the insured is acting under the influence of alcohol.

21. Why are exclusions allowed in policies?

They protect the insurance company from fraud by preventing recovery in cases where the insured deliberately sets out to injure himself simply to receive a windfall.

22. How does insurance coverage affect settlement?

Insurance coverage has huge impact on settlement. If the defendant has only the minimum coverage required by law and the plaintiff's damages are extensive, this will affect how he proceeds on the case. It may even affect the attorney's decision to accept the case.

23. When can a plaintiff use the Discovery process to find out the limits of a defendant's policy?

Rule 26 of the Federal Rules of Evidence provides that the policy limits of insurance policy can be discovered early in the litigation process.

24. How do plaintiffs' firms differ from insurance defense firms?

Plaintiffs' firms are usually paid on a contingency fee, while insurance defense firms are paid by the hour. Besides that, some would argue that there is a philosophical difference between the two, with plaintiffs' firms seen as more liberal, while insurance defense firms are seen as more conservative.

25. How are plaintiffs' firms and insurance defense firms compensated?

Plaintiffs' firms are compensated on a contingency fee basis, meaning that their ultimate compensation is based on a percentage of the plaintiff's final recovery. Insurance defense firms, on the other hand, are compensated on a per-hour basis.

26. What is a settlement letter?

A settlement letter is a letter sent by the plaintiff's attorney to the defense attorney, setting out a summary of the plaintiff's injuries and his demand for an amount that he will accept in exchange for his dismissal of his suit.

27. What is a release?

A release is an official relinquishment of the plaintiff's claim against the defendant, in exchange for the money payment through the settlement.

28. Why did the court in *Grange Mut. Cas. Co. v. Rosko* rule that the insurance company violated its duty to defend? What was the court's rationale?

First of all, the court ruled that the duty to defend is a broad and liberal policy and should be followed, even in marginal cases. Secondly, the court rules



that the passenger clearly fell within the policy's own definition of a covered person, and therefore the duty to defend provision was triggered.

29. What steps should you follow when reviewing an insurance policy?

Start with the declarations page and then review the coverage. After that, read through the definitions and then the limits of liability.

### Answers to "Applying What You Have Learned"

1. According to one source, almost 15% of the average insured's premium is spent on bodily injury claims that are frivolous or fraudulent. Why is this so? Is there some way to correct the system to do away with such claims?

The students' answers will vary according to their personal opinions and ideas.

2. Ted has been injured in an automobile collision. Another driver, Clark Collision, rear-ended Ted's car while Ted was stopped at a red light. This accident occurred on May 15<sup>th</sup> of this year. Ted's car was totaled. The car has a Blue Book value of \$8000. Ted's medical injuries were relatively minor: \$3000. He had arthroscopic surgery performed on his knee. Here is a summary of his medical bills:

Doctors Medical service	\$1500
Civil Rehabilitation Services	\$1500

Based on this information, prepare a Settlement Letter, patterned on Figure 13-10, the Settlement Letter in the Chumley Case.

The student's responses on this assignment should closely resemble Figure 13-10 and should include entries for all amounts.

### Test Bank

#### Essay Questions (5)

1. How does the extent of the defendant's liability coverage affect settlement?
2. Explain the basic provisions of an automobile insurance policy.
3. When is an insurance company's "Duty to defend" triggered?
4. Explain subrogation.
5. Explain "Stacking" of automobile insurance policies.

#### Short Answer (10)

1. What is the "Duty to defend?"
2. What are insurance premiums?
3. Explain what is meant by policy limits.

4. Explain how the rules of civil procedure have changed over time to allow access to information about defendants' policy limits.
5. Explain the basic commitments between a policyholder and insurance company.
6. How do insurance companies make money?
7. Explain how the insurance industry originally developed.
8. Explain how the maximum policy limits are paid out on a per person and per accident basis.
9. What are some of the common exclusions in an automobile insurance policy?
10. Explain uninsured motorist coverage.

### Multiple Choice (25)

1. Which of the following types of insurance is not typically involved in personal injury lawsuits?

- A. Automobile insurance
- B. Homeowner's insurance
- C. Crop insurance \*
- D. All of the above

2. Another name for the insurance contract:

- A. License
- B. Warranty
- C. Policy \*
- D. Premium

3. The term that identifies the payment made by the insured as part of the contract between him and the insurance company:

- A. Premium \*
- B. Contract
- C. Stipends
- D. None of the above

4. The typical financial arrangement between the plaintiff's attorney and his client:

- A. Flat fee
- B. Retainer fee
- C. Contractual fee
- D. Contingency fee \*

5. The common financial arrangement between firms that specialize in insurance defense and the insurance company that retains them.

- A. Contingency fee
- B. Hourly rate \*
- C. Partial payment
- D. None of the above

6. The term referring to the maximum amount that the insurance company will pay out on any particular claim:

- A. Aggregate amount
- B. Minimum coverage by law
- C. Policy limit \*
- D. None of the above

7. One of the most famous insurance companies is named:

- A. The Wilson Co.
- B. Lloyd's of London \*
- C. Benson and Hedges
- D. All of the above

8. Lloyd's of London was founded in:

- A. 1688 \*
- B. 1792
- C. 1864
- D. 1902

9. The insurance industry originally began out of the need to:

- A. Protect soldiers in time of war
- B. Protect merchants who transported goods by ships \*
- C. To secure lines of communication within the British Empire
- D. None of the above

10. After the decision in this case, decided in 1944, the United States Supreme Court ruled that insurance could be regulated by interstate commerce and therefore federal legislation could control it.

- A. U.S. v. Southeastern Underwriters Association \*
- B. Ruffin v. Commonwealth
- C. Rogers v. Lloyd's of London
- D. Surry v. Lowdoin

11. Liability coverage in an insurance policy is usually broken down into two components: personal injury and:

- A. Property damage \*
- B. Emotional damages
- C. Pain and suffering
- D. All of the above

12. The part of the insurance policy that shows the policy limits:

- A. The title page
- B. The cover page
- C. The declarations page \*
- D. The signature page

13. This insurance policy provision provides for the payment of damages to the insured for injuries caused by another driver who did not have an adequate amount of insurance coverage.

- A. Uninsured motorist coverage
- B. Bodily injury coverage
- C. Medical payments coverage
- D. Underinsured motorist coverage \*

14. The term used to describe adding the policy limits of one insurance policy to the policy limits of another policy.

- A. Aggregation of policies
- B. Stacking of policies \*
- C. Reduction of policies
- D. Sequestration of policies

15. In a typical automobile insurance policy you would find each of the following provisions, except:

- A. Limitations on stacking
- B. Duty to defend
- C. Exclusions
- D. All of the above would be listed in a typical automobile insurance policy \*



16. When an attorney is hired by the insurance company to represent the insured in a lawsuit, explain the duty of the attorney:
- A. The attorney owes his duty to the insurance company only
  - B. The attorney owes his duty to act as a fiduciary for the insurance company
  - C. The attorney owes his duty to the insured, even though he is paid by the insurance company \*
  - D. None of the above
17. When the insured seeks a court order stating that the insurance company has a duty to defend him in a suit, this order will usually come in the context of what type of suit?
- A. Equitable remedy
  - B. Declaratory judgment \*
  - C. Petitions for writs
  - D. Petition for habeas corpus
18. Which of the following types of insurance is not typically involved in personal injury lawsuits?
- A. Automobile insurance
  - B. Homeowner's insurance
  - C. Crop insurance \*
  - D. All of the above
19. When researching law on exclusions and an insurance company's duty to defend, you should look to:
- A. State law
  - B. Federal statutes
  - C. Court decisions
  - D. All of the above \*
20. When an insurance policy's provisions touch on an issue of federal law:
- A. The policy provisions are automatically invalid
  - B. You should look to the federal law and federal statutes to see how they impact the policy \*
  - C. No such policy can exist
  - D. None of the above

21. The term for the insurance company's promise to pay the insured's covered losses:

- A. Indemnify \*
- B. Guarantee
- C. Warranty
- D. None of the above

22. Limitations on specific acts that are not covered by an insurance policy.

- A. Premium
- B. Exclusion \*
- C. Expunge been
- D. Reimbursements

23. The insurance policy provision that provides that the insurance company will pay for an attorney to represent the insured, should the insured be sued.

- A. The duty to defend provision \*
- B. The attorney's fees provision
- C. The provisions against losses
- D. None of the above

24. One who is bound by legal and ethical duties to act for the benefit of another.

- A. Party
- B. Fiduciary \*
- C. Authority
- D. Partner

25. Among the legislative initiatives to regulate insurance companies:

- A. Some states require simplified insurance policies
- B. Some states require specific forms and types of font sizes used in the insurance policy
- C. Some states require that insurance policies avoid the use of complicated legal terms
- D. All of the above \*

### **True-False (10)**

1. Attorneys who represent plaintiffs in personal-injury cases normally do so on a contingency fee basis. (T)
2. Attorneys to represent defendants' in personal-injury cases are usually paid by insurance companies. (T)

3. When deciding to accept the case, the plaintiff's attorney does not consider the fact that the defendant has insurance coverage. (F)
4. When the defendant has no financial assets and no insurance coverage, a plaintiff's attorney is unlikely to take the case. (T)
5. Traditionally, discovering a defendant's total policy limits was difficult. (T)
6. Many states require minimum automobile liability insurance coverage. (T)
7. The insurance industry is heavily regulated. (T)
8. The property damage provision of an insurance policy covers not only the damage to property but also its total destruction. (T)
9. An insured is allowed to bring suit against the insurance company to enforce the provisions of the policy. (T)
10. Most automobile drivers are unaware of the policy provisions in their insurance policy.

## Chapter 14

### Business Torts and Misrepresentation

#### Lecture Outline

*Outline discussion:* the various torts, including fraud, that can be brought in a business context. Students will address issues such as negligent misrepresentation and the types of civil injuries that can be brought in a business context.

#### Chapter Outline:

- I. The Shareholders' Suit
- II. Introduction
- III. Fraud
  - A. Proving Fraud
  - B. Alleging Fraud in the Complaint
  - C. Limitations on Fraud Actions
  - D. Fraud and Criminal Law
- IV. Negligent Misrepresentation
  - A. The Restatement Position on Negligent Misrepresentation
  - B. Elements of Negligent Misrepresentation
  - C. Traditional Tort Analysis for Negligent Misrepresentation
3. Duty and Breach of Duty
4. Causation
5. Damages
  - D. Opinions and Negligent Misrepresentation
  - E. Pleading Negligent Misrepresentation
  - F. Defenses to Negligent Misrepresentation
    1. Truth
    2. Opinion
    3. Statement did not concern a material fact
    4. No detrimental reliance on the statement
    5. No damages
    6. Waiver
  - G. Defenses That Are Unavailable in Negligent Misrepresentation
3. "No Knowledge"
4. Lack of privity
5. Good faith
- V. Interference with Contract
  - A. The Elements of Interference with Contract
- VI. Deceptive Trade Practices
  - F. Public and Private Enforcement Under DTPA
- VII. Consumer Protection Laws
- VIII. Follow up on The Shareholders' Suit

- Skills You Need in the Real World: Helping to Try a Case



- Life of a Paralegal: Jane Huffman
- Chapter Summary
- Ethical Issues for the Paralegal: Coaching Witnesses
- Web Sites
- Forms and Court Documents: A Complaint Alleging Misrepresentation

## Additional Web Resources

- Advanced Business Torts Syllabus (Kent College of Law)  
<http://www.kentlaw.edu/classes/rbrill/advancedtorts/btorts.html>
- Insurance Journal – Negligent Misrepresentation  
<http://www.insurancejournal.com/magazines/southcentral/2000/04/24/legalbeat/21166.htm>
- Securities Fraud and Negligent Misrepresentation  
[http://www.law.cornell.edu/ny/ctap/comments/i01\\_0018.htm](http://www.law.cornell.edu/ny/ctap/comments/i01_0018.htm)

## Additional Assignments

1. Have the students review the recent cases involving Enron or other businesses who have been implicated in questionable business practices. Do any of these practices qualify as fraud or negligent misrepresentation? If so, how?

## Answers to Review Questions

1. What is fraudulent misrepresentation and how does it differ from negligent misrepresentation?

Fraud is different from negligent misrepresentation because it involves the intentional action of the defendant who knows that his statement is false. Negligent misrepresentation, on the other hand, involves a statement by the defendant that he does not know is false, or that he recklessly does not care is false.

2. Are there any factual changes that you could make to the “Shareholder’s Suit” hypothetical that began this chapter that would give Tom a stronger case against End-Run?

One fact that could change the result in that hypothetical case would be Tom’s purchase of additional shares based on the false information.

3. Why did the Court in *Federal Land Bank Ass’n of Tyler v. Sloane*, [this chapter’s Case Excerpt] refuse to allow the plaintiffs to receive damages for mental anguish? Why did the court allow some economic damages, but refuse the plaintiff’s request for damages for future damages?

The court reasoned that the plaintiffs would never have received the loan in the first place, so there could be no damages for mental anguish for an event that would not have occurred in any event; similarly, the court ruled that the

plaintiffs could not recover for future damages for their reliance on a loan that would never have been awarded to them in the first place

4. What are the elements of fraudulent misrepresentation?

1. The defendant made a representation of a material fact or concealed a fact
2. That the representation was false
3. That the defendant knew the representation was false
4. That the defendant made the representation with the intent that the plaintiff would rely on it
5. The plaintiff's reliance on the representation was reasonable under the circumstances
6. That the plaintiff suffered injury from his reliance on the representation.

5. Some have said that fraud is not something that can be done unknowingly. Why?

Fraud requires an intentional act to deceive, and this act cannot be done unless the party realizes that he is deceiving another.

6. Courts have consistently refused to limit the definition of what acts constitute fraud. Why have they been reluctant to do so?

Courts have refused to limit the definition of fraud for fear that people would then create a new form of fraud that did not fit into the definition.

7. What is a material fact?

A fact that is basic to a contract, one that the parties consider to be an essential ingredient of the negotiations.

8. How do normal salesmanship statements differ from fraud?

Salesmanship involve statements, exaggerations and other techniques that most people do not take seriously in the first place and therefore could not be reasonably relied upon.

9. What is "clear and convincing" evidence and how does this standard differ from "preponderance of the evidence?"

Clear and convincing evidence is a level of proof higher than mere preponderance of the evidence. In most civil trials preponderance of the evidence is sufficient. Preponderance of the evidence is a standard that simply requires evidence that a contested fact is more likely true than not.

10. How does a fraud case change when the defendant is the plaintiff's fiduciary?

Fiduciaries have an obligation to act in the best interests of another. When they violate this standard, by withholding information, or by taking other actions, additional damages can be awarded.

11. Actions that are classified as fraud can also be crimes. Explain the interplay between civil fraud and criminal fraud.

Civil and criminal actions proceed independently of one another. The same witnesses may testify about the same events, but the end result of the two cases will be different. In a civil case, the defendant may be called upon to pay monetary damages to the plaintiff, while in a criminal case, he may go to prison.

12. What are the elements of negligent misrepresentation?

- The defendant, in the course of his business or profession, makes a false statement
- Believing that the statement is true
- But without reasonable grounds for his belief or in reckless disregard of the truth
- The plaintiff suffered a financial loss because of his reasonable reliance on this false statement

13. The Restatement of Torts limits actions for negligent misrepresentation to statements made by a defendant during the course of his business. Is this limitation too strict? Why would the drafters of the Restatement create this restriction?

Student responses to this question will vary.

14. Why is there a requirement of the plaintiff's "reasonable reliance" on the defendant's statement in a negligent misrepresentation case?

Without such a limitation, a plaintiff could claim reliance on even the most outlandish statements. This would allow a flood of litigation that could bog down the court system for years.

15. Explain how the basic elements of a tort case (Duty-Breach-Causation-Damages) are satisfied in a negligent misrepresentation case.

Essentially, the plaintiff is bringing a negligence case based on a statement. As such, the plaintiff must show that the defendant owed a duty to him. This element often involves the proof that there was a relationship between the parties that would justify the plaintiff's reliance on the defendant's statement. After that, the plaintiff must show how the defendant breached that duty and how the plaintiff's ultimate damages are directly tied to the defendant's breach of duty.

16. What is privity?

Privity is a contract term; it is defined as the direct relationship between the parties to a contract that arises from their involvement in creating the contract.



17. Opinions are usually not classified as negligent misrepresentations. Why? Are there situations in which an opinion can be actionable as a negligent misrepresentation? Explain.

The reason that opinions are not classified as negligent misrepresentation is that most people would agree that there is no basis to reasonably rely on another's opinion. However, this situation can change when the person giving the opinion is in the business of giving opinions, or providing information.

18. What are some of the specifics that should be raised in a Complaint alleging negligent misrepresentation?

The plaintiff must present evidence of the specific false statement or information provided by the defendant, how the plaintiff relied on this information and that his reliance was reasonable.

19. Explain the defenses available in misrepresentation cases.

The following defenses are available:

- Truth
- Opinion
- Statement did not concern a material fact
- No detrimental reliance on the statement
- No damages
- Waiver

20. What is interference with contract? What are the elements of this tort?

The tort of interference with contract, sometimes called interference with contractual relations, is a civil action that can be brought against a third party who interferes with the business relationship between two other parties.

21. Should interference with contract remain an actionable tort? Can you craft an argument against the continued existence of this tort?

Student responses will vary.

22. Explain the public and private enforcement provisions of most states' Deceptive Trade Practices actions.

Deceptive Trade Practices are similar to criminal actions in that the government can bring an action, often through the State Attorney General, while an individual can bring a separate action based on a civil infraction.



## Answers to “Applying What You Have Learned”

1. Should the contract between an attorney and his or her client receive the same level of protection as a typical business contract? Why or why not?

Responses to this question will vary, but should include some discussion of the fact that the contract between the attorney and client is more than a typical contract; it also establishes the attorney-client relationship and all that that entails.

2. Draft an Answer to the Complaint presented in the “Forms and Court Documents” section of this chapter.

The students’ responses will vary.

3. Draft a complaint for negligent misrepresentation using the facts presented in the beginning of this chapter in “The Shareholder’s Suit,” with one important change: Tom, instead of already owning one thousand shares of End-Run Corporation, is now a major investor who has reviewed the bogus financial statements and has been induced by them to purchase a 51% share in the company. How do you address these issues in your complaint?

The students’ responses will vary.

## Test Bank

### Essay Questions (5)

1. Explain the difference between a fact and a material fact.
2. When can a “material omission” give rise to a fraud action?
3. Explain the key differences between fraud and negligent misrepresentation.
4. Explain how the four basic elements of negligence apply in a case of negligent misrepresentation.
5. What types of damages are available in cases involving fraud and misrepresentation?

### Short Answer (10)

1. What type of injury must the plaintiff suffer before he is permitted to bring an action for fraud?
2. What does the term, “Reliance” mean in the context of a fraud action?
3. What is the standard of proof in a fraud case?
4. Explain the historical development of fraud in both the criminal context and the civil context.
5. What are the elements of a claim of negligent misrepresentation?
6. Explain how a civil action for fraud is brought.
7. What is negligent misrepresentation?
8. When does a lie qualify as negligent misrepresentation?

9. What is the difference between preparing a witness for trial and coaching the witness?
10. What are some of the ways that you can help the attorney prepare for the actual trial?

### Multiple Choice (25)

1. Commentators have suggested that the definition of fraud is deliberately vague. What is one argument in support of this statement?
  - A. Leaving fraud as a vague definition allows more plaintiffs to bring suit against defendants in marginal cases
  - B. Making fraud a vague definition is a direct response to the ingenuity of people to create new ways of defrauding others \*
  - C. Leaving fraud vague is unconstitutional
  - D. None of the above
2. Which of the following is an essential element in an action for fraud?
  - A. That the defendant made a false statement
  - B. That the plaintiff relied on this false statement
  - C. That the defendant acted intentionally, knowing that the plaintiff would rely on the statement
  - D. All of the above are essential elements of fraud \*
3. Ted is selling a car. Mark and is interested in buying the car. Ted tells Marvin, "This is the best car the world." Marvin buys the car, but then discovers that the car handles poorly and burns too much gas. Marvin brings a fraud action against Ted. What is the likely result?
  - A. Marvin will win
  - B. Ted will win because this statement was not made intentionally
  - C. Ted will win because his statement was not a misrepresentation of a material fact \*
  - D. Ted will win because used car salesmen enjoy special protection under law
4. Ted is selling another car, this time to Mary. Ted tells Mary that the car has never been in an accident. Ted knows that the car has, in fact, been in several accidents. After Mary buys the car, she discovers Ted's deception. She brings suit against Ted. What is her best claim against him?
  - A. Negligent misrepresentation
  - B. Intentional infliction of emotional distress
  - C. Fraud \*
  - D. All the above

5. John and Ted are opening a business together. They have both agreed to contribute \$20,000 to the enterprise. The effective date of their partnership is April 1st. They will each work a minimum of 40 hours per week for 50 weeks out of the year in the business. Which of the following is not a material fact?

- A. John and Ted are males \*
- B. Each will contribute \$20,000 to the enterprise
- C. Each will work a minimum of 40 hours per week and
- D. The effective date of the partnership is April 1st

6. Which of the following is a requirement in a complaint alleging fraud?

- A. Specific allegations in about the defendant's false representations
- B. A description of how the plaintiff reasonably relied on the defendant's false statements
- C. A description of the injuries that the plaintiff sustained based on the defendant's false representations
- D. All of the above \*

7. In most jurisdictions, this is the standard of proof required of a plaintiff in a fraud case:

- A. Beyond a reasonable doubt
- B. Preponderance of the evidence
- C. Clear and convincing evidence \*
- D. Proof beyond a shadow of a doubt

8. Which of the following are not examples of fraud?

- A. Readily identifiable exaggerations
- B. Opinions
- C. Broken promises
- D. None of the above are fraud \*

9. Reckless disregard for the truth of a statement.

- A. Negligent misrepresentation \*
- B. Fraud
- C. Criminal fraud
- D. None of the above

10. Negligent misrepresentation developed from the law of:

- A. Common law fraud
- B. Common law negligence\*
- C. Common law of trespass
- D. Common law of theft

11. These type of damages are not usually seen in negligent misrepresentation cases:

- A. Psychological injury
- B. Pain and suffering
- C. Loss of consortium
- D. All of the above \*

12. The term for the relationship between parties to a contract:

- A. Plurality
- B. Equity
- C. Privity \*
- D. All of the above

13. An action based on a misrepresentation made without regard to, or with reckless disregard for, the truth.

- A. Design
- B. Negligent misrepresentation \*
- C. Actual fraud
- D. None of the above

14. The problem with the term "Fraud" is that:

- A. It has been overused and has lost some of its legal meaning
- B. It is a word open to many possible definitions
- C. It is not a legal term
- D. A and B, but not C \*



15. John wishes to bring an action for fraud against Tom. John alleges that Tom, who is not a used car salesman and has no special knowledge about automobiles, made the following statement, "This car is a collector's item, and will increase in value of the years to come. " John bought Tom's car, but then learned that the car was not a classic and, that was not likely to increase in value. Does John have a cause of action for negligent misrepresentation against Tom?

- A. Yes
- B. No, because Tom's statement was simply his opinion and there was no basis for John to rely on it \*
- C. No, because Tom's statement was not made intentionally
- D. No, because John waived any possible action against Tom

16. The term for the type of fact whose misrepresentation would have a profound impact on the negotiations and the relationship between the parties.

- A. Material fact \*
- B. Chronological fact
- C. Personal fact
- D. None of the above

17. The purpose of this act is to prevent merchants and others from tricking consumers into buying goods that they otherwise would not want.

- A. The Maritime Act
- B. The Deceptive Bargains Act
- C. The Deceptive Trade Practices Act\*
- D. None of the above

18. This tort, sometimes called interference with contractual relations, is a civil action that can be brought against a third party who interferes with the business relationship between two other parties.

- A. The Deceptive Trade Practices Act
- B. Alienation of Affections
- C. Interference with Contract\*
- D. None of the above

19. In a claim of negligent misrepresentation, the defendant is not permitted to use this defense:

- A. Lack of knowledge
- B. Lack of privity
- C. Waiver
- D. A and B, but not C \*

20. A requirement in a negligent misrepresentation case that the plaintiff's dependence on the defendant's statement was reasonable under the circumstances.

- A. Detrimental injury
- B. Detrimental reliance \*
- C. Detrimental compliance
- D. Detrimental waiver

21. Opinions usually cannot be the basis of a negligent misrepresentation claim, except:

- A. When the opinion is offered as though it is fact
- B. When the opinion is offered by someone who is in the business of giving opinions about specific issues
- C. When the opinion is offered by a relative
- D. A and B, but not C \*

22. In a negligent misrepresentation case, which of the following damages is available to the plaintiff?

- A. Fees associated with applications, licenses, permits, etc.
- B. Punitive damages
- C. Attorney's fees
- D. All of the above \*

23. Which of the following is not an element of negligent misrepresentation?

- A. The defendant, in the course of his business or profession, makes a false statement
- B. Knowing that the statement is false \*
- C. But without reasonable grounds for his belief or in reckless disregard of the truth
- D. The plaintiff suffered a financial loss because of his reasonable reliance on this false statement

24. An unethical practice that results when the legal team informs the witness about what he or she should say while testifying.

- A. Trial preparation
- B. Fee splitting
- C. Coaching \*
- D. None of the above

25. Statutes that exist on the state and federal level, including Federal Truth-in-Lending laws, the Uniform Commercial Code and state limitations on debt collection practices.

- A. Consumer Protection Laws \*
- B. Early release provisions
- C. Statutes of limitation
- D. All of the above

### True-False (10)

1. A plaintiff may bring an action for fraud, despite the fact that he has suffered no injury. (F)
2. In order for the plaintiff to prove fraud, the plaintiff must show that he relied on a false statement made by the defendant. (T)
3. Fraud can be committed without words. (T)
4. When a salesman makes an exaggeration about a product, that exaggeration can always be the subject of a fraud action. (F)
5. In bringing an action for fraud, the plaintiff must prove his case with clear and convincing evidence. (T)
6. Fraud can be both a civil action and a criminal action. (T)
7. The primary difference between negligent misrepresentation and fraud is that in fraud the defendant acts intentionally, while in negligent misrepresentation there is no requirement of intentional conduct. (T)
8. In negligent misrepresentation cases, the plaintiff must often prove some type of relationship between himself and the defendant. (T)
9. All states recognize the tort of negligent misrepresentation. (F)
10. Withholding a fact can also be a false statement. (T)



















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